THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

POST OFFICE DEPARTMENT

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This monograph embodies the results of investigations made by this Committee's staff and reported by it to the Committee. It reflects the views of the staff; its publication at this time indicates neither approval nor disapproval by the Committee of opinions stated in the report, though the monograph's descriptive matter is deemed by the Committee to be accurate. At a later date, the Committee will conduct hearings at which opportunity will be afforded for discussion of the several agencies described in the series of monographs of which this is a part, as well as discussion of general problems of administrative law. Written communications concerning the matters before the Committee will be gladly received at any time and will be carefully considered.

The Committee's final conclusions and report will be made upon consideration of the staff monographs, the record of its oral examination of the administrative officers, and statements made to it in public hearings or in writing.

The Committee's members are Dean Acheson, Chairman, Francis Biddle, Ralph F. Fuchs, Lloyd K. Garrison, D. Lawrence Groner, Henry M. Hart, Jr., Carl McFarland, James W. Morris, Harry Shulman, E. Blythe Stason, and Arthur T. Vanderbilt.

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Director

POST OFFICE DEPARTMENT

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POST OFFICE DEPARTMENT*

Introduction. Not the least of the reasons for the calling of the Constitutional Convention of 1787 was the breakdown, through decentralization, of the method of "conveying intelligence"; even small towns had their own stamps, their own independent postal systems. To remedy this situation, the Convention provided in Article I, section 8, clause 7 of the Constitution, that Congress should have power "To establish Post Offices and Post Roads." Upon this provision is based the present immense postal business of the United States; Congress has vested in the Post Office Department (18 U.S.C. § 304) "an absolute monopoly of the transportation of letters and packets by regular trips or at stated times over all post routes."[1]

Today, the Post Office Department consists of a number of divisions dealing, among others, with Post Office Service (personnel, delivery, post offices), Railway Mail Service, International Postal Service, Air Mail Service, Finance, Postal Savings, Money Orders, Classification, Registered Mails, Parcel Post, and Motor Vehicle Service. For the fiscal year ended June 30, 1938, its expenditures exceeded three-quarters of a billion dollars and its revenue totalled $728,634,051. As of July 1, 1938, the Department employed more than a quarter of a million persons; at the same time, there were 44,667 post offices.

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1. Postal Law and Regulations (herein referred to as P. L. & R.) 1710, note. The note adds: "The term 'packet' . . . means a packet of letters; therefore the Government monopoly does not extend to all matters admitted to the mails, but only to letters."

* This monograph was submitted January, 1940, finally revised February, 1940.

With the expansion of the postal service, Congress has also developed restrictions upon its use. The first was the prohibition of matter which might impair the physical safety of the mail and postal employees: Explosives, noxious articles, live animals, bulky packages, poisons and similar articles were declared unmailable. A second category subsequently developed was that focusing its attention upon the social consequences of the matters offered for mailing. Until the second half of the last century the doctrine had not yet been officially established that postal authorities had the right to interfere with the mailing of printed matter except on grounds of its failure to conform to certain physical standards.[2] Between 1865 and 1873, what has been described as "the Pandora's box" was opened, largely through the efforts of Anthony Comstock. Fight films, intoxicating liquor, lotteries, fraudulent schemes, obscene matter, literature which is treasonable, defamatory or scurrilous or which incites to murder, arson or assassination, all fell under the sanction not only of exclusion, but of criminal penalties as well. Furthermore, as described more fully below, in certain instances persons who were found by the Postmaster General to have used the postal services improperly could be deprived of the right either to utilize some of the services of mailing (as in the case of the second-class mailing privilege), or to receive mail (as in the case of fraud orders).

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2. But the Alien and Sedition Act of 1798 imposed a penalty on persons who mailed treasonable letters. In 1835, a bill introduced by Calhoun and supported by President Jackson to check Abolitionist literature which was sent into the South, was defeated through the opposition of Clay and Webster. Lindsay Rogers, The Postal Power of Congress (1916) 103. But many Southern postmasters managed to bury such literature. See Mary Ware Dennett, Who's Obscene (1930) 210.

The peculiar nature of the postal service as a federal enterprise intended for the convenience of the public,[3] and to produce revenues, has made this a fertile field for federal supervision, apparently unencumbered by such constitutional restraints as freedom of speech or of the press.[4] The theory underlying these broad powers is often stated as being that Congress has a proprietary interest in the postal service; use of the mails, accordingly, is a privilege which can be withheld, and not a constitutional right.[5] Thus, it has been said that "the legislative body in establishing a postal service may annex such conditions as it chooses."[6] Not only are constitutional restraints inapplicable, but judicial restraints also are, for the most part, absent. As described more fully below, Congress can vest in the Postmaster General the administration of the postal "privilege"; since it is asserted to be a "privilege", and since the Postmaster General is an executive officer vested with broad

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3. "The power of establishing postroads must, in every view, be a harmless power, and may perhaps, by judicious management, become productive of great public convenience." Madison, The Federalist, No. 42.

4. ". . . although freedom is guaranteed by the Constitution to the press, there is not any constitutional guarantee to the press, or to any one else, of a free use of the mails." Gitlow v. Kiely, 44 F. (2d) 227,230 (S.D.N.Y.,1920), aff'd. 49 F. (2d) 1077 (C.C.A. 2nd, 1931). See also Ex parte Rapier, 143 U. S. 110 (1892); Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407 (1922).

5. Compare Cushman, National Police Power Under the Postal Clause of the Constitution (1920) 4 Minn. L. Rev. 402, 419 ff.; Ex parte Jackson, 96 U.S. 727 (1877); Missouri Drug Co. v. Wyman, 129 Fed. 623 (E.D. Mo., 1909); People's U.S. Bank v. Gilson, 140 Fed. 1 (E.D.Mo., 1905).

6. Public Clearing House v. Coyne, 194 U. S. 497, 506 (1903). But compare Hale, Unconstitutional Conditions and Constitutional Rights (1935) 35 Columbia L. Rev. 321.

discretion in the premises, hampered by only the most general definitions of "fraud," "disloyal matter," and "obscenity," the courts have been singularly loath to interfere. Few of the hundreds of injunction suits brought against the Postmaster General have been successful.

However theoretical or unrealistic the doctrine of "privilege" may be, especially in the light of the Government's practical monopoly over the means of effective and economical methods of communication, it is in the light of these underlying theories and the history of judicial self-renunciation that the Post Office Department's procedures and methods of administration must be regarded.

I

ADJUDICATION[7]

A. THE ISSUANCE AND REVOCATION OF SECOND-CLASS MAILING PERMITS.

In general; the second-class mailing privilege. Section 221 of Title 39 of the United States Code provides that mailable matter shall

7. In addition to the cases involving the second-class mailing privilege and those involving fraud orders, whose procedure is discussed in detail below, an immense volume of adjudication occurs in connection with exclusion of the mails for a great variety of reasons, including obscenity, treason, inherent danger (explosives, acids, firearms), fraud (including matter dealing with lotteries) and the like. Postmasters are directed to withhold such matters from the mail; if they are in doubt, or if the mailer disagrees with the withholding, the subject-matter is sent to Washington for determination in the Solicitor's office. Another group of cases involves classification: Whether or not any given item belongs to the first, second, third, or fourth class. If the mailer submits a book as literature, for example, but the postmaster holds it is a catalogue subject to catalogue rates, the matter will be referred, with the item in dispute, to the Classification Division in Washington. In both classes of cases, the procedure is almost wholly internal; only occasionally, wealthy or important mailers may confer with the proper officials in Washington; and the questions arising are similar to those discussed in relation to application for and revocation of second-class mailing permits.

Finally, the Department issues licenses to persons eligible to receive specimens of diseased tissue, which are otherwise excluded from the mail. Such licenses are issued pro forma merely upon a showing that the applicant is a graduate bacteriologist, recognized under his local state regulations as being qualified.

be divided into four classes[8] of which the second is to include periodical publications. In accordance with "the historic policy of encouraging by low postal rates the dissemination of current intelligence", Congress has provided special low rates for, and methods of handling, such matter. Rates for second-class mail may be computed on a pound basis; such matter may be mailed in bulk with no weight limit. Rates for third-class matter, on the other hand, are computed by the piece, with a weight limit of eight ounces for each piece. While third-class rates range from eight to twelve cents a pound, second-class rates are about one and one-half cent a pound.

It is difficult to exaggerate the importance of the second-class mailing privilege to prospective mailers. It has been stated that no publication of the type to which that privilege is granted "could exist for any length of time if required not only to pay the third-class postage, but to prepare it for the mails as such matter."[9] A recent commentator has written:[10]

> ". . . the second-class mailing privilege is basic to a free press - the modern newspaper depends to a large extent on the postal service for revenue and circulation . . . In freedom of circulation lies the key to the free press. Before the motion pictures and the radio, the printed word was the only universal medium to reach mass opinion . . . The only economic carrier was the postal service . . . Therefore, the laws and regulations of the Post Office Department are definitive of the boundaries of the rights of a free press in the United States."

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8. For a discussion of the procedure in regard to classification other than that involving second-class matter, see supra note 7.

9. Lewis Publishing Co. v. Wyman, 152 Fed. 787, 793 (E.D.Mo., 1907).

10. Kadin, Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting (1939) 19 Bost. U.L. Rev. 533, 538, 541.

The Postal Acts and the Department's regulations (P. L. & R. §§ 519, 520) do not on their face, however, appear to prescribe much more than physical qualifications for eligibility to the vital privilege. Second-class mail embraces "all newspapers and other periodical publications."[11] They must (1) be issued at stated intervals, and "as frequently as four times a year"; (2) bear a date of issue and be numbered consecutively; (3) issued from a "known office of publication"; (4) be "formed of printed paper sheets, without board, cloth, leather, or other substantial binding such as distinguish printed books from periodical publications"; and (5) be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" and have a "legitimate list of subscribers." Publications "designed primarily for advertising purposes,[12] or for free circulation, or for circulation at nominal rates" are expressly denied second-class privileges. In addition, although there is no express statutory authorization therefor,

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11. Originally, the question of what constitutes a "periodical" was a troublesome one, but the law has since been settled by administrative interpretation and court decisions. E.g., Bates & Guild Co. v. Payne, 194 U.S. 106 (1904); Houghton v. Payne, 194 U.S. 88 (1904).

12. This provision cannot, of course, be strictly construed. In a series of opinions, the Solicitor of the Department has recognized that the actual price of a publication falls far short of its cost, and that its financial basis is advertising. It is tacitly admitted that the motive of earning revenues through advertising need not be incidental; the publication is eligible as long as there is a reasonable sprinkling of suitably undiluted "intelligence."

the second-class mailing privileges may be withheld from publications whose material is obscene, scurrilous, or otherwise offensive.[13]

Finality of the administrative determination: Section 531 of departmental regulations provides that the Third Assistant Postmaster General "shall decide upon the admissibility of publications as second-class matter."[14] The only standard provided is that he be "satisfied that a publication is entitled to admission" to the second class; his judgment is largely unencumbered by further restraints. There is no statutory right to judicial review; and the courts have been loathe to interfere with the administrative decisions in respect

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13. The 1938 Annual Report of the Postmaster General states (pp. 44-45): "Publications entered as second-class matter are sometimes used as vehicles for the circulation through the mails of matter of a questionable character. Under existing laws matter may be unmailable for various reasons, ranging from violations of the lottery laws to obscene literature. The Department has been embarrassed in recent years by the circulation, or attempted circulation, of publications containing matter of obscene or salacious nature. Such matter is unmailable and diligent efforts are constantly being made to prevent its transmission through the mails. Closely tied up with these efforts is the granting or withholding of the second-class mailing privilege . . . In some cases applications for second-class entry of new publications have been denied [on the ground that the publication contained unmailable material]".

14. In fact, where issues of obscenity or similar unmailability are involved in second-class mailing privilege cases, the questions are submitted to the Solicitor's office, and the Third Assistant Postmaster considers himself bound by the Solicitor's determination. The Postal Laws and Regulations seem to call for exercise of the Third Assistant Postmaster's independent judgment, but it is stated where the Solicitor declares matter to be unmailable, "denial or revocation of entry automatically follows the Solicitor's decision as a matter of course."

of second-class mailing privileges. Even where the question is apparently one of law - as, for example, what constitutes a "periodical publication" or "obscenity"[15] - the Department's determination is virtually final. Thus, it has been stated by the Supreme Court of the United States that:

> "where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing." [16]

The Postmaster General (or rather, his Third Assistant), a commentator has observed, may thus "with . . . vague standards . . . exercise his discretion without any substantial interference from the courts."[17]

Procedure in issuance or denial of permits. As of December 31, 1938, 26,232 publications enjoyed a second-class status. During that year, there were 2,616 applications for admission to the second class, or for change in title, in frequency of issue, or in office of publication of existing permittees. Of these applications, 108 were denied.

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15. Anderson v. Patten, 247 Fed. 382 (S.D. N.Y., 1917). The postal statute in this respect differs sharply from that governing the Treasury's Bureau of Customs' power over obscenity. Under an amendment to the Tariff Act of 1930 (19 U.S.C. § 1305) the issue may be relitigated de novo, and the respondent has a right to a trial by jury. See infra, note 42.

16. Bates & Guild Co. v. Payne, 194 U.S. 106 (1904).

17. Kadin, supra note 10, at p. 548.

As stated above, the granting or denial of such permits rests in the jurisdiction of the Third Assistant Postmaster General, although where the issue involves unmailability - a determination made by the Solicitor - the Third Assistant Postmaster follows the Solicitor's decision "as a matter of course." In the office of the Third Assistant Postmaster General is the Division of Classification, headed by a Superintendent with a staff of approximately 57 persons some of whom may "incidentally" be attorneys. The Division of Classification is in turn divided into several special groups, one of which handles questions related to second-class matter. This subdivision is headed by a chief, or senior assistant to the Superintendent; it is within this group that disposition is made of the bulk of questions related to the second-class privilege. When questions of obscenity and other unmailability are involved in second-class cases, however, the matter is referred to and the determination is made by the Solicitor's office.

Proceedings are begun by the filing of a form application[18] with the postmaster in whose district the publication's office is located. The application, in which all vital information such as the office and dates of publication, the ownership, the amount of advertising, the subscription list and similar matters are recorded, must be sworn. An application for entry as second-class matter must be

18. Three different forms are utilized: form 3501 for a domestic newspaper or periodical; form 3501-a for newspapers and periodicals published in a foreign country; and form 3501-b for the publication of a benevolent or fraternal society, or of a strictly professional literary, historical or scientific society, or of a trade union, institution of learning, state board of health, and similar bodies (P. L. & R. 529).

accompanied by a fee of $100; if, however, the publication has a circulation of not more than 2,000 copies, the fee is $25, and if not more than 5,000 copies, $50.[19] If the publication is offered for the first time as matter of the second class, the application must be accompanied by "two representative copies of the publication nearest to the date of the application" (P. L. & R. 529a); in addition, in all cases, the applicant must submit to the local postmaster all relevant records, such as the list of subscribers, receipt stubs, ledger entries, and like material. This evidence is examined by the local postmaster; the subscription list and the list of paid subscribers are analyzed by him to determine whether they correspond, and the postmaster then transmits the application (but ordinarily not the material described above except the publication itself) to Washington. The application as thus transmitted is supplemented by a form entitled "Postmaster's Statement," in which the local postmaster sets forth the facts disclosed by his own analysis and examination. It is stated that the postmaster is "not supposed to" add recommendations of his own, but he is directed to furnish to Washington all relevant information.[20]

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19. If the application is rejected, one-half the fee is returned. A fee of $10 is required for an application for reentry of a publication as second-class matter on account of a change in title, frequency of issue, office of publication, "or for other reason" (P. L. & R. 538).

20. P. L. & R. 535 provides that "When a postmaster has reason to believe that a publisher has submitted to him, or to any postmaster . . . any false statement or evidence as to his publication to secure its transmission as second-class matter, he shall report the fact, with the evidence in his possession substantiating it, to the Third Assistant Postmaster General, Division of Classification." The penalty for submission of false evidence relative to admission to the second-class rate is a fine of not more than $500.

Immediately upon the filing of a proper application, and pending ultimate determination, the postmaster issues to the applicant a permit conditionally accepting the publication for mailing as second-class matter. The postmaster is directed, however, to require a deposit of money sufficient to cover postage at the higher rate which would be applicable in the absence of a second-class permit. If the publication is admitted, the deposit is refunded.[21]

Upon receipt in the office of the Division of Classification, the application is referred to the group of "clerks" (one-half of whom happen to be attorneys) who comprise the second-class section. They examine the application and whatever other material is submitted, prepare the action (i.e., denial or issuance of permit), and transmit the files to the chief of the second-class section for approval. The order then goes to the Third Assistant Postmaster General for his signature. The latter officer, in most cases, does not review the files.

Where the case is a "border-line" one, or there is substantial doubt that the permit should be granted, the second-class section may direct the local postmaster to obtain further facts; copies of such letters of direction are normally sent to the applicant as well.[22]

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21. A conditional permit may sometimes be kept in effect pending ultimate adjudication for as much as five years. E.g., Lewis Pub. Co. v. Wyman, 168 Fed. 752 (E.D. Mo., 1907).

22. The normal practice of notifying the applicant of defects in his application or of contemplated denial might advantageously be embodied in a regulation which would require such notice in all cases.

If it appears that a permit should not be issued, the postmaster and the applicant are so informed, and opportunity is given the latter to correct the defect. Thus, for example, where an application showed that only 125 copies of the publication were sent to subscribers, while 1,150 copies were issued free, a letter was sent to the postmaster pointing out that this did not comply with the law, and that action would be deferred "in order that he [the publisher] may have opportunity to bring the circulation of the publication into harmony with the law. When this is done, consideration will be given to a statement . . . setting forth the circulation of an issue of the publication." The postmaster is directed to hand a copy of the letter to the applicant.

Correspondence of this nature is normally the only further procedure; occasionally, however, if the publisher is important or wealthy enough, or if he is a member of an association which has a representative in Washington, a conference may be had with the Third Assistant Postmaster General who, in turn, will call in the Superintendent of the Classification Division and the chief of the second-class division. Prior to denial or other disposition of the application, no further procedure relating to adducing further evidence, holding hearings, permitting oral argument before, or appeal to, other officers has been established.[23]

23. The necessity for additional procedure in these cases is discussed infra, pp. 22-23.

Revocation procedure: voluntary abandonment cases. Approximately five second-class permits are revoked each month, generally on the ground of "voluntary abandonment" of publication.[24] The "voluntary abandonment" proceedings are described as "cut and dried"; their purpose is simply to "clear the record." No hearing is ordinarily held despite the statutory requirement described below; probably, however, none is needed or desired. Proceedings leading to revocation in this type of case are begun when the postmaster at the office of publication notifies the Third Assistant Postmaster General, Division of Classification, of the suspension of publication.[25] Without further ado, and without any notice to the publisher or further inquiry into the facts, the Division advises the postmaster that the permit has been revoked. The publisher is not even apprised of this action, but it is said that if he should try to mail his publication thereafter, he will learn of the revocation upon the refusal of the postmaster to mail the matter at second-class rates. If at this time the publisher believes the revocation to have been improper, he may submit a statement of facts and the revocation might be reconsidered.

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24. A publication is deemed to have been abandoned if it has not been issued for a reasonable length of time (varying from three months to a year).

25. Publishers are required to submit annual sworn statements concerning ownership, circulation and like matters, which statements are in the first instance examined by the local postmaster. By means of such statements, as well as through his handling the mailing of the publications and his making charges therefor, the postmaster generally has knowledge of the publication's regularity of issue.

It is insisted that this apparently haphazard method of revocation in voluntary abandonment cases presents no difficulties and works satisfactorily since the postmaster does not communicate with the Division of Classification until he is reasonably certain of the publication's suspension. If, however, the postmaster has made a mistake, serious hardship to the publisher may result when, unaware of the revocation, he presents his periodical for mailing. A periodical is ordinarily a perishable product which will be of little utility if it must await reconsideration of the revocation in Washington. A simple solution seems to be to require the postmaster to inform the publisher of his intention to notify Washington of the voluntary abandonment, and, if the publisher objects, provide him with an opportunity to submit to the Division of Classification, within a given period, whatever facts he wishes. It may be expected that the publisher will only rarely take issue with the proposed revocation, but the suggested method at least appears to offer a safeguard against erroneous action by the postmaster.

Initiation of action in other revocation cases. In revocation cases where so-called "hearings", as described below, are held, the most common cause of complaint is a disproportionate amount of free circulation in relation to the subscribed circulation. The second major ground is the presence of textual, as distinguished from display (see P.L. & R. 537), advertisements which either are not characterized as advertising material, or, even if so indicated, are disproportionate to the textual matter of the publication. In an increasing number of cases, according to the 1938 Annual Report (pp. 44-45), publishers

have lost their second-class entry "because of indulgence in the practice of publishing unmailable matter."[26]

Revocation proceedings have their root in advice received from local postmasters,[27] competitors (especially in questions involving a free subscriber list), members of the general public (in questions of excessive advertising and obscenity), and the Department in Washington (which occasionally scrutinizes publications suspected of obscenity). Where a member of the public sets the

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26. At one time, the Post Office Department revoked permits on the ground of the radicalism of the periodical's textual matter. This action, taken under the Espionage Act declaring certain matters disloyal and so unmailable, was upheld by the Supreme Court in Milwaukee Social Democratic Publishing Company v. Burleson, 255 U.S. 407 (1921). But see the dissent of Mr. Justice Holmes: ". . . the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man." In a concurring dissent, Mr. Justice Brandeis, characterizing the Postmaster General as "the universal censor of publications . . . in view of the practical finality of his decisions," argued that the Postmaster General "may not, either as a preventative measure or as a punishment order that in the future mail tendered by a particular person or the future issues of a particular paper shall be refused transmission." Although at present revocation on the ground of the political nature of the publication is not a problem, since no such revocations have occurred, it is evidently the sense of both these dissents that revocation on the ground of unmailability of any nature is not sanctioned by the statutes. Cf. Holmes, J., "The question of the rate has nothing to do with the question whether the matter is mailable, and I am satisfied that the Postmaster General cannot determine in advance that a certain newspaper is going to be non-mailable and on that ground deny it not the use of the mail, but the rate of postage that the statute says shall be charged." But as long as matter may be excluded as non-mailable because it "advocates or urges treason . . . or forcible resistance to any law of the United States" [18 U.S.C. § 344; Gitlow v. Kiely, 44 F. (2d) 227 (S.D.N.Y., 1930), aff'd 49 F. (2d) 1077 (C.C.A. 2nd, 1931)], the possibility of revocation for political sentiments is present.

27. P. L. & R. 588 provides: "Postmasters shall carefully examine mailings of publications entered at their offices as second-class (continued)

machinery in motion by complaint, his identity is not disclosed, a practice which may be subject to some criticism.[28] Not only the pressures of competition but, also, what is more important, the inherent nature of newspapers and periodicals, likely as they are to indur political and other enmity, may make harassment of the publisher through action looking toward revocation of the second-class permit a tempting device.[29] But anonymity may well be an administrative necessity for proper enforcement of the law: Disclosure of the identity of the complainant might too easily open the way to a campaign of vilification, and, in addition, the source or motive of the complaint is immaterial if in fact the publisher is not fulfilling the standards required of a second-class permittee. No great

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27. (continued) matter to ascertain whether the publishers are complying with the law and these regulations. Every postmaster having reason to believe that a publication passing in the mails as matter of the second class is not entitled to the second-class mailing privileges shall report the matter promptly, with any evidence or facts in his possession tending to support such belief, to the Third Assistant Postmaster General, Division of Classification." In one case, action was instituted against a newspaper upon the complaint of the postmistress, who wrote, in enclosing the publisher's statement that all of his subscriptions were paid, that "While I am not positive that this is not true, I cannot prove it", and, in a subsequent letter, that "Personally, I think the paper should be stopped and give somebody else a chance to start up a paper."

28. In one case, action was begun by the Mayor of the town in which the paper was published; the complaint was accompanied by the statement that "The publisher doesn't know I'm doing this. I should like to have an investigation without the disclosure of this report at the present time at least." The publisher accused is often irritated by "confidentiality." One publisher wrote to the Department, "I believe it would be only fair to us to advise from what source pressure is being brought to bear."

29. See infra, note

danger is apparent in the Department's practice of maintaining the confidentiality of the complainant's information if, but only if, careful and independent investigation of the substance of the complaint is made.

Investigation of complaints. Upon receipt of the complaint, the Department undertakes further exploration of the facts, but in most cases, an elaborate investigation is not made. The inquiry is generally conducted by direct letter to the publisher and through the local postmaster. If the latter has made the complaint and has submitted no facts in its support, the Department without first notifying the publisher requests the postmaster to supply a "full explanation and the nature of the evidence." Similarly, if an outsider has made the complaint concerning, for example, the absence of a legitimate list of subscribers, the postmaster is instructed by the Department to obtain a statement of the circulation, examine it, and report. In some, although comparatively few, cases there may at this stage be actual investigation by post office inspectors; for example, if the bona fides of a publisher's subscription list is in question, or he is suspected of falsifying his books, an inspector may either visit the publisher's plant and make an examination, or interview purported subscribers. In a case of this type, questionnaires may also be sent to the alleged subscribers.[30]

30. Some doubts may arise concerning the sufficiency of this investigatory process since, as described below, it may and often does furnish almost the entire basis for the ultimate order of revocation. Because of the heavy reliance in many cases upon the postmaster in the investigatory process, there particularly may be doubts in those cases where the postmaster himself made the complaint. But the nature

Notice of contemplated revocation. If the Division of Classification, or in the case of obscenity or other unmailability, the Solicitor's office, is of the opinion that the evidence points to cause for revocation, the Department addresses a letter to the local postmaster stating the statutory or regulatory ground or grounds for revocation in the particular case, and directing him to give the publisher until a certain date, usually two weeks, "to submit any statement he desires as to why the second-class mailing privilege should not be revoked." The letter, a copy of which is given to the publisher, also indicates what the publisher must establish - a satisfactory statement of circulation, or that he has a known office or the like. The date is often extended in order to permit the publisher to gather whatever material he feels is necessary or to take steps to correct the alleged defect.

Further proceedings: "hearings". It is provided by statute (38 U.S.C. §§ 232) that:

> "When any publication has been accorded second-class mailing privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."[31]

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30. (continued) of the cases may mitigate if not entirely dispel such doubts; most of them involve easily ascertainable facts and neither require, nor are susceptible of, elaborate investigation. Since these characteristics are even more relevant in relation to "hearings", more extended discussion is reserved for a later point. See infra pp. 22-33. It may here be suggested, however, that in cases of conflict - e.g., whether a large number of persons are bona fide subscribers - independent investigation seems ordinarily to be essential at some stage of the proceedings.

31. But it has been held that the revocation of a temporary or conditional permit - even one which has been in effect for five years - need not be preceded by a hearing. Lewis Pub. Co. v. Wyman, 168 Fed. 754 (E.D.Mo., 1907).

It has been said by a federal court that in prescribing a hearing, "Congress meant something more . . . than mere notice to the publisher to show cause by a day certain why the privilege theretofore accorded to him should not be revoked."[32] The hearing, according to this court, need not be a judicial one, nor need it be before the Postmaster General, since "the courts will conclusively presume that the head of a department acted on the testimony submitted to him as fully as if he had been present at the hearings and had not submitted it to one of his assistants;"[33] but the requirement of a hearing necessitates that the publisher "be given the opportunity of presenting his evidence and also be informed what he is called upon to answer."[34]

Despite the requirement of the statute, hearings in the usual sense are not held in connection with revocation orders.[35] If there is any personal appearance at all - a rather unusual occurrence, since the publisher may not be able to afford Washington representatives or a special journey to Washington or may not believe the trip necessary - the "hearing" is nothing more than a conference about matters in issue between the publisher, or his representative,

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32. Lewis Pub. Co. v. Wyman, 152 Fed. 787, 793 (E.D. Mo.,1907).

33. Id. at 791.

34. Id. at 793. The court did not, however, define what constitutes a hearing within the meaning of the statute, since the lack of any notice at all was held to vitiate the revocation order. The question as to whether a hearing requires that the publisher be confronted with the witnesses against him, or at least with their testimony and identity, was suggested but not passed upon.

35. It is stated that there were formal hearings in 1906, when a drive against publishers improperly holding second-class permits led to many revocations.

and the Third Assistant Postmaster General or the Superintendent of the Classification Division. There is no presiding officer, no established order for presentation of evidence, and no stenographic record of the proceedings made. Although it is stated by Departmental officials that, if the publisher actually desired a formal hearing, the Department would grant it, it is to be noted that the citation letter gives no indication of this right, but simply gives the publisher until a certain date "to submit any statement he desires" as to why his second-class mailing privilege should not be revoked. But it is to be observed that it was formerly the practice to give notice of the right to appear and have a formal hearing; this practice was discontinued because the Department believed that publishers often made needless and expensive trips to Washington in cases where the question at issue could just as readily have been presented by letter. While it is true that often the publisher will not wish a hearing, it may be suggested that it be made clear to him that he does have that right if he wishes to exercise it, so that the choice could be left to him.

After citation to show cause is issued, the method of correspondence, rather than of conferences, is ordinarily utilized. Examination of sample files indicates that the Department and the publisher engage in considerable correspondence before final disposition is made; the local postmaster in turn, usually is called

upon to examine whatever questions are raised by such correspondence. Thus in one case, after the publisher was notified that it was "apparent" that he had failed to maintain a legitimate list of subscribers, and that he would be given 14 days before the Department took final action, the publisher replied immediately, promising to cease free distribution. The Department thereupon requested the local postmaster to obtain a list of subscribers and an issue of the paper. The date for final action was deferred 11 days and a copy of this letter was sent to the publisher. The publisher then submitted a subscription list to Washington; at the same time, the postmaster reported that he had interviewed two of the alleged subscribers, who had stated that they had never subscribed. Action was again deferred, this time indefinitely, and the postmaster was directed to obtain and examine the original subscription orders, agent's orders, receipt stubs, cash book, ledger entries, and dates of subscription. Again, a copy of this letter was sent to the publisher.[36] After more than two months, the Department directed the postmaster to tell the publisher that only a little more time would be permitted him. Soon thereafter, the publisher sent in his subscription stubs, but nevertheless, approximately six months after the citation, the revocation order was issued.[37]

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36. It is said that when questionnaires are submitted to alleged subscribers, or the latter are interviewed, the summary (but not the identity of those questioned) is submitted to the publisher in order to afford him an opportunity for rebuttal. It is not apparent from the files in this case that the substance of the postmaster's report concerning his interviews was submitted to the publisher.

37. The important role of the postmaster is illustrated by another (continued)

No statement of reasons accompanies the revocation order.[38] It takes the form of a letter addressed to the local postmaster and recites the issuance of the citation, and that "The Department hereby determines upon all the facts . . . that [name] is not entitled to transmission in the mails at the second-class rates . . . because [statutory grounds set out]." The postmaster is directed to submit a copy to the publisher.[39]

Comments concerning the procedure relating to second-class permits. Aside from the question whether the statutory requirement of a hearing is fulfilled by the present procedure in revocation cases - a question which possibly has become moot by virtue of a long established and judicially unquestioned administrative practice - the procedural problems involved in both application cases and

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37. (continued) case where the permit was revoked because of the absence of a known office. The postmaster was notified of the complaint, and replied immediately that the publisher had no office in his postal area. Citation issued. The publisher then wrote that he had established an office. The postmaster next informed the Department that he had visited the alleged office, and had interviewed the occupant, who denied connection with the publisher, and was unable to produce any business records or other indicia. The permit was forthwith revoked. When the publisher protested, the Department replied that its postmaster had said that the purported office was not in fact an office.

38. The internal procedure leading to the order is identical with that utilized in relation to applications (supra. pp. 9-12). Initial consideration is by the second-class section, and there is successive review before issuance by the chief of the section, the Superintendent of Classification, and the Third Assistant Postmaster General.

39. No provision is made for further intra-agency appeal in revocation or denial cases. In fact, however, the publisher, through Congressmen or other powerful intermediaries, may manage to gain the ear of the Postmaster General, who may then call in the subordinates involved for discussion of the issues.

revocation cases are similar.[40] These problems must be posed initially in terms of the powers granted, which since they involve virtual control of effective communication of the written word without judicial review, are of unquestioned magnitude and importance. It has been stated by one commentator, critical of the structure itself, that:[41]

> "In a country where the will of the majority is constitutionally estopped from erasing the opinion of the minorities, the printed word is subjected to offical scrutiny on two fronts, obscenity[42] and radicalism,[43] despite constitutional mandate. Pre-censorship, supposedly alien to our law, has firmly entrenched itself within the citadel. Before written idea may pass from the thinker to the people, it must be adjudged by the appointee of the political majority . . . As a practical matter, therefore, the most extensive medium of communication may be dominated by a very few men."

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40. It may be argued, however, that since revocation (ending an established business) is more drastic and a more complete deprivation than denial of the permit in the first instance (refusing entrance of a new business), more elaborate procedure is in order for the former.

41. Kadin, supra note 10, at 548. See also the dissents of Holmes and Brandeis, JJ., in the Milwaukee Publishing case, quoted in part supra note 26.

42. But a bill has recently been submitted to divest the Department of its power to exclude from the mails under Section 211, and place the determination of obscenity in the courts. H.R. 4923, 76th Cong. (March 1939).

43. As previously pointed out (supra note 26), however, the issue of radicalism is at present more potential than real. In the Gitlow case where the publication contained exclamatory exhortations to class revolution, the Milwaukee Publishing doctrine of revocation was abandoned for exclusion of the single issue. Even this type of censorship of radicalism seems for the time being to be unused. The present resurgence of anti-Communism and anti-radicalism coupled with abandonment of the united front and revification of the revolutionary slogans, may, however, wake the sleeping dog.

At the outset, it is to be noted that the absence of formal hearings has not been criticized, so far as is ascertainable, by publishers. The vast majority of them are satisfied to deal with the question at issue by letter, rather than by personal appearance for conference or other hearing. Except for cases involving unmailability - a decision resting with the Solicitor's Office - no publisher has appealed to the courts from actions of the Third Assistant's Office in the last twenty years. Nor can there be serious quarrel with the procedure followed in the bulk of the second-class cases, which are properly described as "routine". Where the question is whether the publication is a "periodical", or is numbered consecutively, or satisfies the physical requirements for second-class matter, elaborate investigation and the usual administrative hearing methods are unnecessary and unhelpful in both application and revocation cases. The decision can be made on the basis of a single item of physical evidence - the publication - which speaks for itself; investigators' reports or the testimony of witnesses could scarcely facilitate the deliberative process. The only issues on which the publisher might profitably be heard are the ultimate conclusions, and no reason appears why written briefs or oral arguments are not sufficient. In revocation cases where these issues arise, the publisher is informed in advance through the citation letter, and has ample opportunity to present his arguments. In cases involving applications, although there is no formal notification of contemplated denial or the grounds thereof, the applicant in fact is ordinarily made aware of the grounds

through correspondence (see supra, p. 12), and has a similar opportunity. It is not clear that even a brief on such issues can serve a useful purpose, but at least the right exists and it is not apparent that more is necessary.

Presenting a somewhat different problem are the cases where the issue is whether the periodical has been published at least four times a year and at regularly stated intervals, or whether it has an established office. These are propositions of fact which may possibly, though not probably, give rise to a dispute; the issue may not be resolvable in Washington without reference to outside sources. Where, for example, the issue involves the existence of a known office, there may be a square conflict of claims.[44] But most difficult of this group of cases involving "facts" are those dealing with the issue of a legitimate list of subscribers, and other questions relating to the statutory prohibition against free circulation or circulation at nominal rates. Especially in this type of case, there may be factual issues customarily adduced through a more formal evidentiary, if not the testimonial, process. Adjudication of these issues solely on the basis of the ex parte assertions of the publisher and the postmaster, is probably satisfactory in most cases. But one may lose confidence in the conclusion reached in the absence of a safeguard against error in the form of an opportunity for the publisher directly to present his case, and to refute adverse evidence. Especially is this true if the postmaster through his complaint has himself initiated the proceedings. As has been indicated above, heavy reliance is sometimes placed upon the postmaster in the

44. See supra note 37.

investigatory process both before and after the citation letter is issued. Even when he interviews purported subscribers, only his report of what the persons interviewed are alleged to have said appears in the files; often only his report on the examination of the list of alleged subscribers, of the receipt stubs, and other documentary evidence is available, and not the documents themselves.

On the one hand, it may be argued that the issues in these cases are not complex, and that the facts are easily ascertainable by the postmaster, whose integrity as a reporter may be unimpeachable. On the other hand, however, it must be conceded that the local postmaster is not chosen for his abilities either as an adjudicator or as a detective. The accurate reporting of facts is not entirely a matter of honesty; it is a task which involves a measure of skill both in finding the evidence and in its interpretation. It is wholly possible, moreover, particularly in small communities, that publishers who disseminate news and opinions may become embroiled in bitter local controversies; it is not inconceivable that the postmaster may take an interest in such controversies. Bordering as they do upon questions of freedom of speech and of the press, moreover, some cases may give rise to delicate issues and considerable emotion. In either type of case, there is grave question whether the local postmaster is ideally suited to play so important a part in the resolution of the issues.

Where these cases turn on fact questions, the solution may possibly lie in requiring the holding of hearings before a trial examiner, with the opportunity to produce witnesses, to examine and cross-examine, and to enjoy all the other aspects of "quasi-judicial" proceedings. But for the right to such a hearing to be a substantial and meaningful one to most publishers - publishers of small newspapers or periodicals who can ill afford trips to Washington - the hearing would probably have to be in the field. To accomplish this, a group of hearing officers would have to be established to sit as magistrates as the occasion required.[45]

This, however, appears to be a device which is cumbersome and expensive without compensating utility to the Department; nor does it appear to be a device without which the publisher would be unable to obtain opportunity for a fair presentation and resolution of the issues. It is difficult to envisage what sort of testimony could be produced at a hearing relative to so simple an issue as the existence of a "known office" or of regular publication dates, or even with respect to the issue of a legitimate list of subscribers (it would scarcely be feasible to call all alleged subscribers to testify), which independent and intelligent investigation could not establish with greater facility and equal assurance that the facts are being properly explored. While, indeed, there may be an ultimate issue of credibility - whether or not the publisher is misstating his

45. If this system were to be adopted, consideration might also be given to vesting such hearing officers with jurisdiction over all classification and fraud order cases.

innocence of violations of the statutory requirements - the factual questions upon which this ultimate issue depends seem to be tangible and objective enough to make a formal hearing unnecessary.

As a substitute for the requirement of a hearing in this type of case, however, a complete independent investigation should be supplied. Where a postmaster states that there is no known office, and the publisher insists that there is, or where the postmaster informs the Department that the subscribers have never in fact subscribed, and the publisher denies it, the issue is framed, and it is a proper one for the Department, at this point, to send in its own inspector to investigate and report. He might be given power to administer an oath to the persons he interviews, and wherever feasible he should obtain affidavits. He should inform the publisher of whatever adverse evidence he has obtained, and give the publisher, in turn, every opportunity to submit his own statements and affidavits, and those of whomever else the publisher wishes. In most cases, this would not seem to be a difficult or time-consuming task; the Department could then proceed to its determination with assurance that an independent investigation has been made, and that it has all the facts before it.[46] The present right to a "hearing", that is, the right to

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46. Examination of sample files in fraud order cases discloses the inspectors' reports to be uniformly excellent - complete, workmanlike and objective. On the other hand, the postmasters' reports are less satisfactory - short, and not always either literate or intelligible. It should be noted that the procedure suggested in the text is no departure from the general outlines of the present practice. As noted previously, inspectors are utilized on occasion, and in all probability, have not been more freely utilized only because of lack of funds. Nevertheless, where there is a square conflict of fact between the publisher's statements and the postmaster's, and neither is inherently improbable

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confer personally or through representatives with officials in Washington should, of course, be retained as supplementary to the investigation.

The final group of cases are those involving denial of applications for, or revocation of, the second-class mailing privileges on grounds of obscenity or other unmailability.[47] At the outset, it should be noted that despite its potential breadth, the powers have in recent years been sparingly used. As already observed, denial or revocation for "radicalism" has not recently been an active issue. Further, the Department's power rather than the exercise thereof in particular cases, to deny or revoke for obscenity has for the past several years been the subject of controversy: The absence of public clamor would seem to indicate that only cheap and tawdry obscenity has been barred, and that there has been no confusion between filth on the one hand, and what some might insist is art or education on the other.

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46. (continued) or incredible, independent investigation by an inspector seems desirable in all cases.

47. As described in footnote 7 above, the procedure for the determination of questions of unmailability, as well as the problems arising therefrom, is similar to that involved in second-class mailing privilege matters discussed in the text. Accordingly, this discussion is equally applicable to questions of exclusion from the mails for reasons of obscenity and the like. One further comment may be made: Mailers are not now always notified that the Department is considering exclusion. Sometimes a publisher may be unaware of the exclusion until his subscribers complain that they have not received the periodical. The Post Office Censor, National Council on Freedom from Censorship (1931) 7.

It would seem desirable to give the publisher notice in such cases, even though the exclusion must usually be prompt.

Nevertheless, in recognition of the potential power with its susceptibility to abusive exercise,[48] the question whether the existing procedure is most suitable for the determination of the issues need be considered. This type of case is similar to the first group discussed above in that the very res in controversy ordinarily speaks for itself. Although characterization of the text as obscene or treasonable may involve more delicate questions of personal judgment and discretion than determination of whether the publication is "formed of printed paper sheets, without board, cloth, leather or other substantial bindings", both determinations

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48. Thus, for example, in describing a case involving unmailability, where, of course, the dangers and issues are the same, the National Council on Freedom from Censorship summarized the case of Carlo Tresca, editor of "Il Martello", an Italian newspaper published in New York, as follows:

"In July, 1923, the Italian Ambassador made a speech in New York in which he said 'A certain paper in the United States is embarrassing to the Faschist (sic) government and should be suppressed.'" Action resulted at once . . .

"July 21, issue of the paper held up, no explanation.

"August 10, Tresca arrested for article "Down with Monarchy", then three months old.

"August 18, Post Office Department ordered the deletion of an announcement of a raffle. Two other newspapers carried the announcement unmolested.

"September 8, issue held up for two-line advertisement of a birth control book . . . Other papers carrying the same advertisement were not molested.

"October 30, Tresca indicted for above offense.

"October 27, issue held up because of an account how Fascisti had forced an Italian woman to drink a large dose of castor oil. Most American papers carried the same story unmolested.

"November 10, issue held up for containing a letter from a reader predicting that Mussolini would come to the same end as Rienzi. Other papers carried similar stories and were not molested." National Council on Freedom from Censorship, The Post Office Censor (1931) 8. The same pamphlet reports (at 9): "The Daily Worker was held up on October 25, 1928, when the Post Office Department objected to a special California campaign edition . . . After some delay Postmaster General New explained that the paper was withheld because of failure to provide the Postmaster with evidence of bona fide circulation. The edition was later released."

can be made by scrutiny of the matter at hand.[49] Hearings on the question of what is obscene or otherwise unsuitable for mailing purposes is a matter of Departmental policy and it is doubtful whether a parade of witnesses or even oral argument would, in the very nature of things, affect that determination of policy where, through tentative decision to deny an application or citation to show cause in revocation cases, the policy has already been set out in the particular case. If, moreover, after tentative determination prior to a hearing, the Department wished to sustain its position at a hearing, it could in the best of faith always find witnesses who sincerely believe the matter to be obscene; thus, it could produce evidence to support its ultimate conclusion. Under such circumstances, a formal hearing at which there is testimony would be an empty gesture.

The Department, therefore, seems to be justified in dispensing with formal hearings prior to denial or revocation in this groups of cases. Conference in satisfaction of the statutory requirement of hearings in revocation cases may or may not be useful; at least discussion concerning particular printed material seems more helpful than adversary hearings. Assuming then, that formal

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49. Cases involving the question of excess advertising, either in proportion to the text or actually under the guise of textual material, seem to fall somewhere in between the first and third group of cases in respect of the degree of intangibility and the degree of personal judgment which must be invoked. No attempt is made by the Department to reach the more subtle forms of textual advertising, and indeed, this would probably be impossible.

hearings have properly been eliminated, and accepting the existing frame-work of administrative, rather than jury, determination, the conclusion is inescapable that "procedure" is not the real issue. Although the Supreme Court has provided guides as to what constitutes "obscenity" as used in the postal statutes,[50] it is difficult to escape the conclusion that obscenity is "largely a question of one's own conscience."[51] The important question, then, is whose conscience it is, and what manner of man he is. Yet the accidental quality of the personal element may at least in a measure be avoided by a deliberate choice of expert advice. The experience of the Customs Bureau of the Treasury Department is revealing: Goaded by the clamor arising from a series of egregious blunders in respect of exclusion of what some of its employees took to be obscene, the Treasury Department some years ago adopted the practice of submitting questionable material to an enlighted connoisseur of the arts and literature upon whose advice it leaned heavily. Subsequently, he was retained by the Treasury Department, but although the bulk of determinations are now made by him, his is not always a personalized and individual judgment. Rather he turns to experts for advice. If the matter in issue purports to be a scientific work, but may be pseudo-

50. Swearingen v. United States, 161 U.S. 446 (1896); United States v. Limehouse, 285 U.S. 424 (1932)

51. In 1907-08, 6,530 pieces of mail were excluded as obscene or scurrilous, while 281 were excluded in 1909, and 44 in 1910. Critics of administrative determination of obscenity cite these figures as indicative of the extent to which obscenity is a matter of personal judgment, influenced by the modes of the moment. National Council on Freedom from Censorship, op. cit. supra note 48, at 4. Of course, other factors may have entered into the shifts indicated by these figures.

scientific and simply pornographic, the work is submitted to expert scientists in the field who can readily distinguish the educational impulse from the pornographic. Humility and a recognition that a proper determination of what is obscene requires a knowledge so wide and a sympathy so broad that one man is unlikely to be able, without outside assistance, to undertake the task,[52] seem the best safeguards against administrative aberrations in this field. At present, the Post Office Department's determination is made without any canvass of outsiders' opinions. It may be possible for it to appoint panels of experts - scholars in the field of art, the sciences, literature, and sociology - to whom it may turn for opinions and recommendations. Even if no formal advisory panels should be created, it would seem desirable for the Post Office Department to emulate the Treasury's policy of informally seeking outside advice. In the great majority of cases coming before the Post Office Department, it is doubtless true that there is no question; it is in the exceptional case, however, that the utmost of care is required, since it seems just as important to protect the public from the truly obscene masquerading under the guise of art or science as it is to guard against the public's being deprived of that which is not lewd, but artistic or scientific. Experts in these fields would seem to be best equipped to aid in the delicate adjustments required.[53]

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52. "There are special interests of history and biography, of science and art, which call for special treatment . . . These cases cannot be brought within the compass of any definite rule, particularly in a field where we are concerned with one of the most complex of human impulses." Huntington Cairns, Freedom of Expression in Literature, pamphlet reprinted from the Annals of the American Academy of Political and Social Science (November, 1938)

53. Officials of the Department, however, believe that such a plan is not feasible. Their reasons are set out in Appendix "A", infra p. 95.

B. FRAUD ORDERS

General nature. Section 259 of Title 39 of the United States Code empowers the Postmaster General to deny the right to receive mail to any person or company, or the agent or representative of any such person or company, who "is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind . . . or is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises . . ." The Postmaster may not only prevent receipt through the mail of all letters,[54] but he may also "forbid the payment by any postmaster to a person or company of any postal money orders drawn to his or its order, or to the agent of any such person or company, . . ." (39 U.S.C. §§ 732). The statutory sanction, therefore, is intended to strike at the defrauder at the vital point, before he can consummate his fraud.

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54. The Postmaster General may "instruct postmasters at any post office at which registered letters or any other letters or mail matter directed to any such person or company, or to the agent or representative of such company . . . to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped on the outside thereof . . ." (39 U.S.C. § 259).

An earlier statute provided for the return only of registered mail and money orders. 17 Stat. at L. 283 (1872). In addition, only fraudulent lotteries and devices were proscribed. Finally, the statute was restricted by an opinion of the Attorney General that only registered mail which the Postmaster General was satisfied contained matter bearing directly on the fraudulent enterprise could be halted [18 Op. Attorney General 306 (1885)]. These restrictions were soon

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In addition, letters, papers, and similar matter concerning lotteries or other schemes, involving chance, lottery tickets, and the like, and checks, money, and other payments for such tickets, are forbidden to be deposited in or carried by the mails or delivered by a carrier (18 U.S.C. § 336), while Section 338 proscribes the mailing of other fraudulent devices, schemes, promises or representations.[55] Finally, "all matter the deposit of which in the mails is made punishable" - including matter concerning lotteries and frauds - is declared by the statute to be nonmailable; the Department cannot, however, deny any user the mails under the provisions of the criminal statute, and it has taken the position that such matter is unmailable only after there has been a conviction.[56]

Lottery orders are not ordinarily issued against domestic enterprises;[57] rather the severity of the penalty - cutting off the

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54. (continued) lifted; authority was given to proceed against any lottery, whether or not fraudulent; and all mail matter addressed to the promoters, whether or not registered, and whether or not suspected to concern the fraudulent business, could be stopped.

55. Penalty for violation of Section 336 is a maximum fine of $1,000 and 2 years' imprisonment, while Section 338 prescribes a maximum penalty of $1,000 fine and 5 years' imprisonment.

56. In addition, there are special "fictitious name" statutes. A person usinga fictitious or false name for the purpose of conducting a proscribed scheme is subject to fine and imprisonment (18 U.S.C. § 339). Further, the Postmaster General may instruct any postmaster at any post office receiving such letters, cards and the like addressed to the fictitious name, to notify the persons claiming the mail matter to appear and be identified. If the person fails to appear and be identified; or "if it shall satisfactorily appear" that such letters, cards and similar mail are addressed to a fictitious name, the mail matter is forwarded to the dead letter office (39 U.S.C. § 255).

57. Such orders are more commonly issued against foreign sweepstakes and similar schemes.

respondent's incoming mail - has resulted in the Department's wisely withholding action leading to such orders in the less extreme cases. Thus if the lottery or other illegal game of chance is simply a "business attracting" scheme clearly incidental to a legitimate enterprise - as, for example, an attempt by a retail grocer to promote sales by running a contest depending on chance, and resulting in extra "bargains" to the customers - the Department is content simply to notify the person that the scheme is improper and the advertisements are unmailable. But where the business itself is the management of lotteries, or where the quid pro quo offered is merely incidental and a "blind" utilized for evasion (e.g., the sale of inexpensive pencils accompanying an endless chain scheme), the Department institutes lottery order proceedings.[58]

The existence of a parallel policy of flexibility, varying with the enormity of the offense, in respect of fraud order cases is somewhat less clear. The statute does not require as a condition precedent to the issuance of a fraud order that the respondent's scheme be wholly fraudulent; it is enough that there be "false or fraudulent pretenses, representations or promises". Thus it is at least possible under the statute for the Department to strike down an entire business (since it is difficult to envision how most enterprises could continue if unable to receive any mail at all) if it is

58. A second factor which diminishes the need for invoking the lottery order against domestic enterprises is that most publishers and companies now follow the practice of submitting the details of their scheme and their advertising to the Department for a ruling. In almost all cases where the Department's ruling is adverse, the matter will not be deposited for mailing; consequently, the lottery order need not be invoked. See infra, pp. 88-89.

fraudulent in one or more phases of its operations, or even if an overenthusiastic entrepreneur overstepped the bounds with a single false representation or promise in his advertising. That a fraud order may occasionally issue under circumstances of this nature is indicated by the case of a foreign dealer selling stamps on approval: The record of the case discloses a finding by the Department that "for the most part", the dealer's business was legitimate; nevertheless, he was alleged to have attempted to obtain payment from persons who had returned the stamps by writing them dunning letters claiming he had not received the returns. A fraud order was issued against him (although it was subsequently withdrawn on his stipulation to discontinue all business on approval). But despite the assertions of respondents' attorneys, it is apparent that cases of issuance of fraud orders against businesses which are only false in one phase of operation or in respect of minor representations are rare, and the Department's broad powers do not, therefore, seem to raise any very serious problems. This is attributable to two reasons: first, the Department's limited funds and personnel necessarily enable it to proceed only against the most heinous offenders; and second, it is said that "the vast majority of all mail order schemes charged with using the mails to defraud are entirely dishonest so far as the use of the mails is concerned." In any event, the seriousness of the problem, whether it be actual or hypothetical, is mitigated by the Department's practice, where deemed suitable, to accept a stipulation from the respondent to cease that portion of his business which is fraudulent, and to return all remittances obtained in response

to his fraudulent use of the mails.[59] Finally, it is asserted that even if a fraud order were issued against a single name used in the conduct of both a fraudulent scheme and a phase of the business not illegal, nothing prevents the concern, if it so desires, from continuing the legitimate business under another name.

Judicial review. Despite the wide powers vested in the Postmaster General in respect of the issuance of fraud orders, the statutes, as in the case of the second-class mailing privilege, make no provision for judicial review. The only legal remedy available is the injunction to prevent enforcement of the order, and the judiciary has, by and large, steadfastly refused to interfere with the judgment of the Postmaster General in these cases. Varying degrees of judicial self-abnegation have been announced. At one extreme is the doctrine that in the absence of fraud or error of law, the Postmaster General's decision will remain undisturbed.[60]

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59. As stated above, once a fraud order issues, the statute provides for nothing less than the return of all mail; nor can less be effectively prescribed since, in view of the prohibition against opening any letter not addressed to the opener (39 U.S.C. §§ 269, 732), the Department would be unable to determine which of the letters were in response to the fraudulent appeal and which were not. The power to declare the representations unmailable is, indeed, a lesser sanction, but scarcely feasible or effective.

For a discussion of the relation of the postal statutes to the Federal Trade Commission in these respects, see infra pp. 84-87.

60. Thus, it has been held that "where an officer or department is empowered by Congress to determine a question of fact, the finding of fact made is binding upon the courts . . . [The Postmaster General] committed no error of law, and his findings of fact are not open to inquiry by the courts." People's Bank v. Gilson, 140 Fed. 1, 6 (E. D. Mo., 1905) . See also Lewis Publishing Co. v. Wyman, 152 Fed. 187 (E.D. Mo., 1904). "Only in the extremest cases should courts interfere with . . .[the] issuance [of fraud orders]." Crane v. Nichols, 1 F. (2d) 33 (S.D. Tex., 1924).

Another view is that the Postmaster General's findings of fact are final "if there be any evidence at all on which he may act."[61] The most recent view, however, appears to be that fraud orders are subject to the same judicial standards as the orders of other administrative agencies - i.e., they must be "supported by substantial evidence".[62] It should be noted that although they make the same requirements, the courts have indicated that they will rely on the Post Office Department's findings and judgment somewhat more heavily than they are willing to do in respect of other agencies.

Procedure in general. Between November 1, 1938, and October 31, 1939, 350 domestic fraud order cases were handled by the Department. In approximately 275 of these, citations were issued, naming 758 persons and concerns. Ninety-six fraud orders were issued after hearing; in 176 cases, the scheme alleged to be fraudulent was discontinued after service of citation.

The statute contains only one procedural provision for the handling of these cases: The Postmaster General may issue the order "upon evidence satisfactory to him." This requirement is observed

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61. Putnam v. Morgan, 172 Fed. 450 (S.D.N.Y., 1909)

62. " . . . the conclusion of a head of an executive department will not be reviewed by the courts, where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and arbitrary." Leach v. Carlisle, 258 U.S. 138 (1922); Farley v. Simmons, 99 F. (2d) 343 (C.C.A. D.C., 1938), cert. den. 305 U.S. 651 (1939). Perhaps the same view is sometimes treated in terms of presumption of correctness; the presumption may be controverted on a showing that the Postmaster General acted "wantonly or maliciously" [Hall v. Willcox, 225 Fed. 233 (S.D.N.Y., 1906)] or even by a "preponderance of evidence" (Sanden v. Morgan, 225 Fed. 266 (S.D. N.Y., 1915)).

only constructively, as indeed, in light of the Postmaster General's other duties, it must be; administration of the fraud order statutes has been instead placed in the hands of the Solicitor's office. In this office, in turn, is a separate section composed of a chief attorney, seven assistant attorneys, and eight or nine clerks, devoted to fraud order cases.

Despite the absence of statutory prescriptions for procedure, domestic fraud order cases in their general outlines follow the orthodox administrative course, beginning with the investigation of complaints preliminary to the issuance of a citation which is followed by a hearing leading to the issuance of decision and order.

Initiation of action; investigation. Action in fraud order cases is most often initiated by informal complaints addressed to the Post Office Department by members of the general public - usually those believing themselves mulcted by the scheme. On occasion, however, complaints are made by competitors, by better business bureaus, and by associations of business or professional men. The Department may, of course, and sometimes does, take action upon its own motion and in the absence of complaints; as a practical matter, however, it is largely dependent upon others to draw its attention to fraudulent schemes.

Complaints are transmitted to the Bureau of Chief Inspector, a separate departmental unit. Unless the complaints are obviously frivolous on their face, or do not concern the soliciting and obtaining

of money and property through the mails,[63] the Chief Inspector "jackets" the case and assigns it to a post office inspector for investigation.[64] This investigation (in very complex cases consuming as much as a year's expenditure of effort) is usually a complete and extended one,[65] and involves interviews of alleged victims, as well as of the persons who conduct the enterprise[66] (who are thus ordinarily informed of this phase of action). In medical or similar cases, it is also common for the inspector assigned to the case to obtain the assistance of other post office employees who pretend to be prospective customers, to describe their "diseases", or send in samples, and wait for the nostrum, the false teeth, the eye-glasses, or whatever "cure" is being offered. The articles sent in return are submitted to the Bureau of Standards for analysis, and to medical officers in other federal agencies, assigned specially to assist in studying the matters involved.[67]

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63. Where the Chief Inspector is in doubt concerning the law involved, he may submit the question to the fraud section in the Solicitor's office for advice concerning the desirability or methods of further investigation. This, however, is rare.

64. In cases where the defrauder advertises the doing of something which as a matter of clear and known fact he cannot do, investigation may be eliminated. See the practice in relation to obscenity advertisements in foreign fraud orders infra pp. 83-84.

65. It is said that the day of bare-faced frauds is over, and new refinements and subtleties make investigations somewhat more difficult.

66. Probably because they feel that a cooperative spirit may avoid the imposition of criminal sanctions against them, the persons investigated have been willing to permit inspection of their books and enterprises, despite the Department's lack of a subpoena or other formal power.

67. Medical assistants may sometimes accompany the inspectors and examine persons who have been "treated."

After all the material has thus been gathered, the inspector prepares his report, supplemented, where necessary, by medical reports. The inspector's reports, which are complete, orderly, objective and workmanlike, are submitted to the Chief Inspector's office for formal editing, and also for examination as to whether leads have been sufficiently developed. Thereafter, they are sent to the fraud section, where they are analyzed by subordinates in order to determine whether probability of violation is shown. The subordinates prepare a memorandum of charges, accompanied by trial briefs which set out the evidence pro and con on each item of the charges concerning the alleged fraudulent representations. The memorandum and brief are submitted, in turn, to the chief attorney of the fraud section; he analyzes this material and determines thereupon whether the citation should issue.[68] Of the 350 domestic fraud cases handled during the year ending October 31, 1939, 34 were closed at this point because of insufficient evidence, while 41 were referred back to the Chief Inspector for further investigation.

The pleadings. The complaint, prepared by the subordinate who analyzed the inspector's report and approved by the section's chief attorney, is known as a "memorandum of charges". It is signed by the chief attorney, is addressed to the Solicitor, and is entitled "Memorandum recommending the issuance of a citation to show cause why

68. The citation is not issued unless the section feels quite sure that the evidence is sufficiently persuasive to make out a prima facie case. As expressed by one official, "One way to get your face red in this business is to issue an unwarranted citation."

a fraud order should not be issued."[69] The memorandum, rarely exceeding three double-spaced pages, charges in statutory terms that the parties named are violating the law in that they have made certain specified representations[70] "Whereas in truth and in fact, as said concern well knows, all of the aforesaid pretenses, representations and promises are false and fraudulent." In other words, the memorandum simply sets out each of the separate statements, and alleges them to be false; no attempt is made to state precisely wherein or why the representations are alleged to be fraudulent; nor is there any effort to segregate that precise part of the representation which may be improper. Yet it is doubtful that any real hardship is occasioned by the form of the memorandum, although respondents' attorneys are given to complaining of its generality.[71] In fact, the respondent,

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69. The peculiar form of this "complaint" may be noted. Instead of appearing as the action of the agency or an official thereof directed to the respondent, as is usually the case, this complaint has the flavor of an internal memorandum. It concludes with a recommendation in the first person. While perhaps not a matter of grave importance, it would seem that a complaint issued in the name of the Department might be more dignified.

70. Typical of such allegations is the following: "That the said concern will furnish eyeglasses of a 'perfect fit' to all remitters upon the basis of the information obtained by the use of the so-called eye tester; that all persons who cannot read clearly and distinctly the text contained in the said concern's so-called preliminary 'quick easy test' need eye-glasses, . . ."

71. Bills of particulars are frequently requested, but always refused. The Department's attorneys take the position that its specifications of charges are sufficiently clear to furnish the respondent full opportunity "to know what he's up against." In ruling that the fraud order procedure did not run counter to the Morgan case, Letts. J., held that "We have specific charges and claims, and the respondent here - or rather the plaintiff here - knew exactly why he was summoned; he was under an order to show cause why this fraud order should not

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as described above, has ordinarily long since got wind of the contemplated proceedings and has been interviewed. Moreover, it is not apparent that the memorandum can be made more specific without setting forth evidentiary matter.

The memorandum of charges is served upon the respondent together with the "citation letter" signed by the Solicitor. A form letter, it states the prescribed sanction forbidding the delivery of mail and payment of money orders, gives notice of the time and place of hearing, apprizes the respondent that the case will be heard and disposed of whether or not there is appearance or answer, and that he has a right to file an answer in writing which "may be forwarded by mail or presented in person or by counsel" at the hearing.[72] The two documents are sealed in an envelope addressed to the respondent, which is transmitted with a letter of instructions to the postmaster at the office of address of the respondent. The postmaster is directed to have the enclosure delivered personally to the respondent and to obtain a receipt, which is to be returned to the Solicitor.

Voluntary discontinuances. At this stage of the proceedings, after citation is issued and before hearing is held, many of the cases (in the year ending October 31, 1939, 176 of the total of 350 cases)

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71. (continued) be issued and signed, so we do not have to look at the record to determine whether or not the respondent . . . was fairly advised of the claims and contentions of the Postmaster General." National Weeklies, Inc. v. Farley, Civil Action No. 2869, District Court for the District of Columbia, June 1, 1939.

72. Answers in the form of blanket denials are often filed. No form is required, and failure to answer is treated as a denial.

end through "voluntary discontinuances" - that is, the respondent's immediate abandonment of the business. Indeed, the issuance of the citation and the setting of a hearing is considered by Department attorneys as a valuable device for obtaining the cessation of unlawful activities. Formerly, it was not rare to accept discontinuances before the issuance of the citation, but the practice proved to be unsatisfactory. These pre-complaint discontinuances were usually effected in the field by the inspector; when faced by the inspectors, the respondents' courage was at a low ebb and they were willing to promise to behave. It was found, however, that as soon as the inspector departed, the respondent's courage flowed back, he would attempt to hedge or recall his renunciation, negotiations would be reopened, and confusion resulted. Further, it is said that to permit discontinuances at this stage was to ask, or allow, the respondent to stop doing something which had not been tentatively determined by the Solicitor's office to be illegal, and that on reconsideration, this fact usually occurred to the respondents. Thus it is now felt that "the safest thing" is to reject voluntary discontinuances at this stage; once the citation is issued and the hearing is scheduled, the issue is "clear cut",[73] and the matter will not, as it otherwise may, "drag on for months."

The "voluntary discontinuance" is attested by an affidavit, signed and sworn to by the respondent, stating that the schemes have

73. The respondent has often come to Washington to appear at a hearing and then after consultation with members of the fraud section, stipulated discontinuance.

been abandoned and will not be resumed. It also often provides for the return to the senders of all mail and remittances relating to the enterprise alleged to be fraudulent, permits the Department to issue a fraud order without further notice if it receives evidence that the business agreed to be discontinued is resumed,[74] and expressly states that although the affidavit does not relieve the affiant of responsibility for violation of the criminal statutes, "the filing of this affidavit shall not be construed as a confession that said statutes have been violated."[75] As a result of such voluntary abandonment, the respondent is relieved of the stigma of having mail addressed to him marked "fraudulent" and returned to the senders: Instead, the mail is returned marked "out of business". It might be imagined that rather than risk the former dishonor, the respondent will discontinue voluntarily even though not in fact guilty; in view, however, of the care with which investigation is made before the

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74. In fact, however, if the business is resumed the more recent practice is to give notice and hearing even following the execution of an affidavit. The new practice is attributed to a desire "to hear the respondent first."

75. In the foreign fraud order case described <u>supra</u> p. 37, upon reconsideration by the Department after the order had been issued, an affidavit agreeing to discontinue a <u>method</u> of operation (i.e., to discontinue allegedly fraudulent and certainly irritating dunning letters, and to discontinue sending stamps on approval) was accepted. This is rare, and it is a source of complaint among members of the bar that the Department will accept nothing less than a stipulation to cease the particular business altogether. In fact, however, in view of the penalty prescribed by the statute (that <u>all</u> mail be returned and marked "fraudulent") there is some doubt that the Department has power to accept less than complete discontinuance. If this doubt is groundless, it is submitted that the Department should permit discontinuance of the improper phase (only) of the business if it believes the business is not wholly evil or the respondent not entirely mischievous.

citation issues (it may be recalled that 75 of the 350 fraud order cases for the year ending October 31, 1939, were either dropped altogether before citation or referred back to the Chief Inspector), and, further, in view of the fact that respondents usually initiate the voluntary discontinuance and are ordinarily urged by the Department's representatives to "present their case if they have a good one", there is no reason to believe that citations are indiscriminately utilized to serve as a blackjack.[76]

Since it is stated to be "easy to go out of business, change one's name and start all over again,"[77] the chief attorney of the fraud section is sometimes somewhat hesitant to accept stipulations which he may suspect of not being bona fide. If the respondent, in the Department's experience, is a known scamp, or if this is one of the particularly vicious classes of cases (such as the attempt to sell worthless or harmful remedies to cure tuberculosis and other serious diseases) voluntary discontinuances are refused.

Acceptance or rejection of voluntary discontinuances lies in the discretion of the chief attorney of the fraud order section.

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76. After conferences leading to voluntary discontinuances, comment is often made by respondents and their attorneys that the attitude of the Department's representatives has been "extremely fair and considerate."

77. But as noted below, supplemental orders may be issued against respondents found to have violated the statutes who subsequently change names and resume the scheme. In the light of the stipulation that a fraud order can be issued without notice and hearing upon the Department's receipt of evidence of resumption, this difficulty would seem to be possible of quick and easy adjustment. The real criterion apparently is whether the accused is such that his activities should be exposed at public hearings and through notations on all mail addressed to him.

While his decision to accept is invariably final, his rejection of discontinuances has occasionally been overruled by his superiors when they have been persuaded by the respondent or his representative that the chief attorney's decision was ill-advised.

Hearings: time; the possibility of injunctions pendente lite. The hearing date is ordinarily set for from three to four weeks after the citation letter is sent; in cases where the respondents reside near Washington the time may be somewhat shorter. Respondents' attorneys persistently complain that insufficient notice is given, yet examination of a recent docket of cases discloses that continuances[78] (although usually for fairly short periods and not necessarily at the respondent's request) are very frequently granted. It may be observed that the respondent has often long since become aware that proceedings against him are being contemplated, and the period between notice and hearing may not be indicative of the actual time which the respondent has to prepare his defense. Further, it seems clear that in this type of case, speed is important,[79] and the Department may legitimately be suspicious of requests for continuances

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78. It is stated that continuances will be granted when the respondent can show "substantial need and hardship." Applications for continuances are made by telegraph or mail.

79. With this statement, some respondents' attorneys disagree, characterizing the Department's insistence on speed as "baloney." Their dissent is based on two premises: (1) that often more than a year is spent investigating the case, so a few more weeks make little difference; and (2) that the day of the bare-faced and fly-by-night frauds is over. The schemes now being made the subject of proceedings often "have something to be said for them" and have been going on for years, so that, again, three weeks more are immaterial. It is not felt that

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which may have the effect of enabling a respondent to reap further fruits of his fraudulent scheme. If too much time elapses before the ultimate order issues, respondents may find the risk a worthwhile one, since they may have exhausted their list of potential victims, plucked what they want, and so find a fraud order of no disastrous consequence.

The nature of the subject-matter with which the fraud order section deals and the need for expeditious correction in order to protect Barnum's minute men suggest the possible utility of employing here a device resembling an injunction pendente lite.[80] At present the Department does not impound the respondent's mail upon the issuance of a complaint, so that, until the ultimate order is issued, he is free to continue his allegedly fraudulent scheme.[81] Protection would

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79. (continued) these arguments are persuasive. Once a prima facie showing of fraud is made, reasonable speed is essential, regardless of the prior longevity of the scheme. Nevertheless, it is probable that in some cases involving the interviewing of many purchasers of the respondent's products, extensive tests, and technical evidence, the respondent may legitimately require considerable time. But fourteen days' notice has been held not to be such an unreasonable time as to vitiate the proceedings. Branaman v. Harris, 189 Fed. 461 (W. D. Mo., 1911)

80. As described below, some phases of the post-hearing procedure raise doubts concerning their complete fairness to the litigants. Many of the administrative short-cuts other than the comparatively brief period between notice and hearing are attributed to the need for expedition.

81. At one time the Department did impound the respondent's mail pending hearing. Two courts, however, enjoined the practice on the ground that it destroyed the privilege of the use of the mails without a hearing. Donnell Mfg. Co. v. Wyman, 156 Fed. 415 (E.D. Mo., 1907); see Myers v. Cheesman, 174 Fed. 783 (C.C.A.6th, 1909). But compare In re Rice, 256 Fed. 858 (S.D.N.Y., 1919) where the court approved of the practice since "on the one hand, the public is protected, and, on (continued)

be afforded the public, and to the respondent as well as in so far as the need for speed would be decreased and fuller hearing could be afforded, if provision were made either for impounding the respondent's mail or for enjoining his allegedly fraudulent business activities after citation and pending hearing. The impounding or injunction could be issued on a showing of a prima facie case, but whether it should be issued administratively[82] or by a court is debatable. If the Department were empowered to issue a temporary restraining order of a type somewhat comparable to an injunction (supported by some description of statutory sanction), there would be no fresh consideration of the question whether such an order should issue; in determining to issue a citation the Department has already taken the stand that a prima facie case exists, and the advisability of utilizing a temporary restraining order would probably be determined by the same persons who issued the citation. To invoke judicial assistance might, in turn, be cumbersome, and might place the process in the hands of those not entirely familiar with the problem.[83] In any event, the injunction pendente lite or impounding might be for a limited period

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81. (continued) the other hand, the person has a fair opportunity to be heard." In this case, however, the respondent had stipulated for the impounding of his mail pending hearing. It is to be noted that the "fictitious name" statute (supra note 56) permits a practice somewhat similar to impounding. The Postmaster may, upon evidence satisfactory to him that anybody is using a fictitious name or address and is conducting a fraudulent scheme, order the postmaster to hold the mail addressed to such person pending his appearance and identification; upon failure of the addressee to appear or identify himself, the mail shall be forwarded to the dead-letter office.

82. But see the Donnell Mfg. Co. case, cited in note 81 above, and compare the judicial leniency, described below, in relation to hearings leading to the order.

83. As already noted, however, the inspectors' reports are extremely complete and thorough, presenting a clear picture of the situation. It may be expected that such reports would furnish a fair basis for determination whether an injunction should issue.

of time to avoid the danger of the respondent's being victimized, in turn, by dilatory tactics which might ruin his business before the issuance of the decision, even though the decision might ultimately be favorable. Upon a showing of need by those trying and adjudicating the case, the injunction might be extended from time to time.

The possible development of some such method of controlling potentially dangerous business practices pending a hearing is not without precedent. Suggestive analogies may be found in the widely-held administrative power to suspend the collection of rates fixed by public utilities, until there has been opportunity to consider their propriety; in Section 13 of the Federal Trade Commission Act which empowers the Commission, when it appears to be to the interest of the public, to proceed in a United States district court by injunction to halt an existing or to prevent threatened false advertising pending the Commission's issuance of a complaint and final determination; and in the often granted power temporarily to rescind permits and licenses pending the determination whether the licensee should be permanently deprived of his license. Especially in the field of public health and safety a long tradition justifies summary action, lest the delays of the hearing process give rise to dangers which can not be wholly relieved by later redressive action. Familiar examples are the abatement of nuisances, the destruction of uninspected foodstuffs, and the quarantining of animals and vegetable products which have not been shown to be infected. In all such cases the possible public harm is thought to warrant measures which

may occasionally cause financial or other loss to individuals whose persons or property are subjected to controls merely upon belief (possibly mistaken) that they are sources of danger. Many of the fraud order cases involve alleged dangers to health and safety. Others involve get-rich-quick schemes where the Department's official action must, if it is to be useful at all, precede the climax of the scheme. There is, therefore, a firm doctrinal foundation for utilizing in this field of postal regulation a method of interlocutory protection considerably less affirmative in its action than controls long since employed in comparable circumstances.[84]

Hearings; place; the hearing officer. All hearings are held at the Post Office Department in Washington, in a room equipped with all the judicial appointments, including a raised bench for the hearing officer, counsels' tables, and a raised dais for the witnesses. Although some hardship is imposed upon respondents

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84. It is not entirely clear that a statutory amendment would be necessary to permit the Post Office Department immediately to impound the mail addressed to a person suspected of fraud. Its broad powers over the use of the mails, and the absence of a statutory requirement of a hearing give weight to the belief that impounding is now possible. But as described in footnote 81, at least two United States district courts have enjoined impounding prior to the hearing. The recent judicial tendency to require some form of hearing, however, probably necessitates a statutory amendment.

In any event, spokesmen of the Department are opposed to the utilization of such a device (1) because the public application to the court would become a matter of news and, even though the respondent were not guilty, the incidental publicity might well serve to destroy his business; and (2) because it would be necessary to disclose to dishonest persons and concerns the nature and particulars of the evidence upon which the Department would rely, "which in many classes of schemes would result in ingenious devices to circumvent or negative the value of such evidence however persuasive at the time when first revealed."

in requiring them to present their case in Washington, especially where they may desire to produce a large number of witnesses (employees and purchasers), and although hearings in the field might be preferable, at present only central hearings seem feasible. The Department has only one trial examiner; the volume of cases heard does not warrant the consumption of the time or the expense which would be involved in hearings in the field. If, however, as suggested below, the staff of examiners should ever be increased, consideration should be given to the holding of field hearings.[85]

Section 10(8) (a) of the Postal Laws and Regulations (1932) provides for delegating to the Solicitor the duty of conducting the fraud order hearings. Except in rare cases, however, the Solicitor does not personally preside at the hearing; rather the duty is in turn assigned to an attorney on the Solicitor's staff who constitutes a one man trial examiner's staff.[86] This hearing officer is not

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85. At present, the field inspector must come to Washington for the hearing. This expense would be saved. But, on the other hand, the convenient availability of governmental and other experts who often assist in fraud order cases would be lost (although, at the same time, the respondent may find it easier to call experts on his own behalf in field hearings), and the Department's staff of attorneys, medical advisers and clerical help would probably have to be increased. The conclusion is inescapable, however, that the practice of holding hearings only in Washington works wholly in favor of the Department, and to the disadvantage of the respondent. This hardship could at least in some measure be alleviated by the availability of a deposition process (<u>infra</u>, pp. 67-68).

86. In 1908, a joint Congressional committee proposed the creation of a Commission of Postal Appeals, composed of three members, one to be a lawyer appointed by the President. This Commission was intended to pass upon the merits of a case prior to the Postmaster General's issuance of a fraud order, and pending such determination, impounding was to be permissible. Final Report of the Joint Commission on the (continued)

administratively a member of the fraud order section (although in fact his office adjoins those of the chief of the fraud order section and his assistants), and he is responsible only to the Solicitor. He devotes the major part of his time to fraud order matters. During the hearing, apparently to comply with the letter if not the spirit of P. L. & R. 10, the trial examiner is addressed as the "Solicitor."[87]

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86. (continued) Business Method of the Postoffice Department (1908) 60th Cong., 2nd Sess. Sen. Rep. 701, ch. 4. The proposal was rejected.

The present hearing officer, a former attorney general for the 12th district of Tennessee, has served in that capacity since 1933. Prior to his employment, the Assistant Solicitor had conducted hearings, a practice which was discontinued in order to enable the Solicitor to act as a "sort of court of appeals." As is indicated infra pp. 69-71, the Solicitor does not act in a truly appellate capacity because at the time he begins his consideration of the case, there is no public expression of the Department's views in the form of an intermediate report or proposed decision, to which the parties may address their arguments.

It is said that the Solicitor has ample time in which to preside at some of the hearings although the pressure of his other duties would make it impossible for him to conduct all the cases. One may suggest in light of this statement, that it would not be inappropriate for the Solicitor to preside whenever possible. While it has become rather fashionable for persons charged with the duty of deciding cases to delegate the task of conducting hearings to subordinates, there is no reason why the adjudicator, if he is in a position so to do, should not be the hearer of the case as well. Particularly is that so if the hearing officer's functions do not include the preparation of an intermediate report for submission to the parties and the adjudicator is required to consider the entire record without the benefit of the narrowing effect upon the critical issues of parties' exceptions.

Respondents have from time to time sought to enjoin fraud orders on the ground that the Postmaster General did not personally preside at the hearings. These contentions have been invariably rejected. " . . . in the matter of hearings, . . . no particular person need conduct them." Smith v. Hitchcock, 226 U.S. 56 (1912); see also People's U. S. Bank v. Gilson, 140 Fed. 1 (E.D. Mo., 1905); Crane v. Nichols, 1 F. (2d) 33 (S.D. Tex., 1924); Plapao Laboratories v. Farley, 92 F. (2d) 228 (App. D.C., 1937), cert. den. 302 U.S. 372 (1938).

87. Department officials defend this practice on the grounds that: (continued)

The hearing officer is completely insulated from any phase of the pre-trial proceedings. He is assigned to the case on the same day it is set for hearing, and is not even presented with the pleadings until the hearing opens. Because the Department has found it is "desirable to read the memorandum of charges aloud in the presence of the respondent and his counsel, who very frequently does not present his answer until they have been read," the pleadings are read into the record when the hearing begins. But the respondent has long since had opportunity to digest the charges and it seems preferable, if only to save the few extra minutes and to give the examiner some inkling of the issues in advance, to present the pleadings to the examiner shortly before the hearing.

The hearing; default proceedings. The statute does not require a hearing prior to issuance of a fraud order; until fifteen years ago, hearings were not ordinarily held unless specific request was made therefor. Since that time, domestic fraud orders have not been issued unless a hearing has first been held.

So far has the Department gone in the direction of requiring hearings prior to the issuance of a domestic fraud order, that in recent years it has been its practice to hold a hearing and present its case through witnesses even where the respondent failed to answer

87. (continued) (1) the presiding officer performs his duties on behalf of the Solicitor, and "at least" the Department's counsel present the evidence "in the same manner as though the Solicitor himself were present"; (2) it adds to the decorum of the proceedings to address a hearing officer "by a title commanding respect".

and appear. In view of the statement in the citation that a hearing will be held whether or not the respondent answers or appears, it is apparent that the Department has necessarily been required to conduct default hearings. The practice, moreover, is regarded not unfavorably by the administrative officers themselves, who feel that the delay involved is not so considerable as to outweigh the advantages of a testimonial presentation of the Department's case. If the witnesses are available and present (as they probably are, since ordinarily it is not until the hearing opens that the non-appearance of the respondent is definitely known), only a few hours of the hearing officer's,[38] the trial attorney's and the witnesses' time are lost.

While the practice of holding default hearings is thus possibly justifiable, one may nevertheless suggest that the Department reconsider its policy in this respect. The time and effort consumed by these hearings may not be staggering, but, to the extent that any energies are needlessly expended, it is clearly desirable that they should be conserved by the Department, handicapped as it is by totally inadequate appropriations, for more significant activities.

The Department is more fortunately situated than certain other administrative agencies which feel constrained to hold default hearings, since the statute under which it operates, as already noted, makes no

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88. See, however, infra p. 78, where it is suggested that the hearing officer's time may be better spent in fuller participation in the post-hearing phases of fraud order cases.

reference to the necessity of a hearing or even of granting an opportunity for a hearing as a prerequisite to the issuance of a fraud order. The sole requirement is that the Postmaster General act on "evidence satisfactory to him." Such evidence, as indicated by the Department's practice in second-class mailing privilege cases, may be obtained not only through a formal auditory process but also by way of intelligent and thorough investigatory methods. In the absence of any compelling considerations to the contrary, therefore, one may suggest that, in the event of default, the Department should rely upon the results of its investigations rather than proceed in the same manner as it does in contested cases.

Several reasons have been advanced for the continuance of the present practice. It is said: (1) the most convenient way to place the evidence before the Postmaster General or any other superior official responsible for the decision of cases is by the reduction of the fruits of the investigation to the form of a record; (2) the testimonial process is peculiarly useful as a means for clarifying any matters as to which the evidence is not clear or conclusive; (3) the respondent is more fully protected if the witnesses are required to testify under oath to the matters they previously asserted to the Department's investigators, and are subjected to interrogation by the hearing officer, a dispassionate individual who has had no previous contact with the case; and (4) the Department is protected in the event that its fraud order is attacked, because it will have a "record" supporting its action to present to the reviewing court.

The first argument does not appear to be of great substance since the investigators' reports and the trial briefs on which the Department bases its decision to issue a citation should be at least as adequate as a record. Of perhaps greater force are the arguments concerning the different approach and the opportunity for clarification afforded by the aural process. That these contentions are not wholly speculative is indicated by a recent case in which the respondent did not appear (although he did file an answer), where the charges were dismissed as a result of the failure of the evidence, on oral presentation, to develop in the manner expected. While it cannot be anticipated that the Department will never be in error in instituting proceedings, it nevertheless appears to be reasonable to assume that in situations where the respondent indicates no desire whatsoever to defend against the charges made, reliance may be placed upon the conclusions reached after a complete and thorough ex parte investigation. Citations are not issued promiscuously but, on the contrary, are the subject of considerable thought on the part of responsible officials. Their appraisal of the situation, in the face of a complete lack of interest on the part of the respondent, would seem to provide sufficient protection to an alleged defrauder.

The Department's fear that it would be without a "record" to submit to a reviewing court does not appear to be well grounded. In the first place, it does have a "record" in the form of the inspector's reports on which it predicates its action. Apart from this, however, it is difficult to understand how a respondent who has failed to exhaust, or utilize in the slightest, his administrative remedies,

would have any standing to attack a fraud order. The non-existence of a record, be it between blue covers or in the form of sundry informal reports, is a procedural defect which is unavailable to a person who has so completely disregarded the exhortations of the agency to defend himself.

Some guard against hasty action which might take the respondent unawares may be established by revising the form of the notice and by preserving, where good reason is shown, the practice of holding hearings even in the absence of the respondent's appearance. Rather than set a date for hearing whether or not there is answer or appearance, the Department should notify the respondent in the citation letter (1) that he has a right to a hearing on a certain date; (2) that the hearing will be held if, ten days before the date set, he (a) requests a hearing and appears on the date set or (b) requests a hearing, states that he will not appear, but submits an answer and supporting material which raise substantial issues of fact; and (3) that if he does not request a hearing or submit such material, a fraud order will issue on the date set and without a hearing. In this way, the respondent will be fully apprised of the consequences of his failure to appear and answer; and in addition, where appearance in Washington is a burden upon the respondent and he can show that the case is a close one where a hearing may be useful, the hearing will be held.

Conduct of the hearings. In general, it may be said that the Department's hearings conform to the usual administrative hearings leading to cease and desist orders. The Department has no formalized

procedure, and no written rules of practice;[89] rather, the methods are the result of a gradual evolution. It is said by the Assistant Solicitor that "in so far as practicable, regular court procedure is followed in the trial."[90] Rigid formality, however, is absent. The hearing officer, as well as the attorneys, are permitted to, and do, smoke; there may sometimes be considerable conversation, and on one or two occasions the chief attorney or others were observed to drop in and suggest, in loud whispers, questions to be put to the witnesses by the trial attorney.

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89. No reason appears for the absence of articulation of the rules of practice applicable in fraud order proceedings, particularly in view of the fact that more or less standardized methods have become established. No matter how conscientious the administrative agency may be, the absence of written rules may often lead the uninitiated to believe that the agency is simply being malevolent, anxious to vary its rules from case to case according to whim and for that reason refraining from putting its rules in writing. In addition, of course, such rules would be useful not only to the respondents and their attorneys who are unfamiliar with the rules by which the Department plays, but also to the Department's own attorneys and hearing officer. If this suggestion needs further emphasis at all, one need only call to mind the confusion created at a recent hearing when the respondent requested the right to take a deposition. It was only after hurried conferences between the Department officials that it was announced that there was no deposition practice.

90. The Courts have evinced a marked leniency in treating of the nature of the hearings. In Elliott Works v. Frisk, 58 F. (2d) 820 (D. Iowa, 1932), the court stated (p. 824):

> "Congress has not defined or prescribed any rules of procedure to be had before the Postmaster General . . . but it is apparent that a full and fair hearing on demand should be permitted. That does not necessarily mean that the Solicitor holding the hearing should require all the methods and procedures of a court hearing. . . The investigation may even be secret and ex parte. If this is not the proper procedure, such methods at least are not unauthorized by the laws and could not be considered by a court as unwarranted and unlawful."

Earlier, it was held that no hearing at all was necessary, and that respondent was not denied due process because it was refused the privilege of examining the witnesses against it. People's U.S. Bank v.

(continued)

At all hearings, the Department is represented not only by its hearing officer, but also by the attorney who prepared the pleadings and the trial brief;[91] in medical cases, he is aided in framing questions by medical experts assigned from other federal agencies. This trial attorney is an advocate in the full sense of the term, but it is stated by Post Office Department officials that he may assist the respondent in any legitimate manner that appears to be needed. It is said to be his duty to see that the record

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90. (continued) Gilson, 140 Fed. 1 (E.D.Mo., 1905). But other courts hold to the contrary. E. G. Donnell Mfg. Co. v. Wyman, 156 Fed. 415 (E. D. Mo., 1907) ("The findings to be binding upon the court, must be after . . . hearing"); Hurley v. Dolan, 297 Fed. 825 (C.C.A. 1st, 1924) (opportunity for defense required). The recent attacks on the fraud order procedure, based upon the Morgan case (298 U.S. 468) have uniformly failed. Plapao Laboratories v. Farley, 92 F. (2d) 228 (App. D.C., 1937), cert. den. 302 U.S. 732 (1938); National Conference on Legalizing Lotteries v. Farley, 96 F. (2d) 861 (App. D.C., 1938), cert. den. 305 U.S. 629 (1938); Simmons v. Farley, 99 F. (2d) 345 (App. D.C., 1938), cert. den. 305 U.S. 651 (1938); National Weeklies, Inc. v. Farley (D.D.C. 1939, unreported).

91. Respondents are ordinarily represented by counsel. The Department prefers that respondent appear both in person and by attorney, since it feels that "where competent counsel represent the respondent his rights are, or should be, fully safeguarded . . . Moreover such counsel for respondents better appreciate the legal questions involved and by explaining the situation as it arises to their clients frequently facilitate disposition of the case by the Department." The Department has established a bar for attorneys practicing before it. An attorney seeking admission must certify as to whether he has held a government position or been disbarred, and he must take an oath to uphold the Constitution. Although some of the Department's attorneys feel that the provisions for a bar are salutary, respondents' counsel rarely are required to take the steps necessary for admission.

No rules governing intervention have been established because requests to intervene are rare. In one case a dentists' association sought to intervene to assist the Department, but proved to be more of a hindrance than a help and was thereafter barred. It is probable that such associations will henceforth be denied the right to intervene in support of the complaint; an official states that he does not want these associations "to run the Department."

contains all relevant evidence, whether or not such evidence favors his position as Government counsel attempting to sustain the charges of fraud. The hearing officer, who "participates in whatever way he feels necessary to elucidate the situation, short of cross-examination," is also fully equipped to assist and protect the respondent if and when it is necessary.

Present at the hearings is a stenographer to record the proceedings. The Department does not have a reporting contract; instead, the stenographer is one of the Department's own employees. His notes are usually transcribed, but in "certain cases of lesser importance" - where the facts are simple, the respondent does not appear, or the evidence is available in documentary form - the stenographic record is not transcribed. The record is not, however, available to the respondent, either free or otherwise. If he wishes a transcript, he must so determine in advance and bring in his own court stenographer. If this is done, the Department dispenses with its own stenographer and obtains a copy of the record from the respondent. This practice is the source of some complaint by respondents' attorneys, especially those accustomed to the contracting services of other administrative agencies, and, indeed, it does appear to impose considerable hardship and expense upon the respondents.[92] Many find the cost prohibitive and may thus find themselves precluded either from arguing intelligently before the Solicitor after the hearing, or determining whether to take court action. The Department, however, defends its practice

92. In one case, the respondent hired a stenographer, but found it so expensive that he was forced to give up the services after one day.

on the grounds that it has no authority to sell copies of its own transcripts, and that to engage a reporting service by contract is too expensive, and not provided for in its budget.[93] The argument of expense cannot, of course, justify the Department's failure to give a copy of the transcript to the respondent when in fact its own stenographer prepares the transcript for the Department's use. It would scarcely be expensive or burdensome for the stenographer to run off an extra copy if request is made in sufficient time, and, indeed, this is the practice at some agencies. It is submitted that effective disposition of cases and fairness to the respondents require the practical availability of the record; if the Department balks at the charitable act of running off an extra copy gratis[94] strenuous efforts should be made to correct the present defect by obtaining a contracting service.[95]

The process of proof. As previously noted, the hearing opens with the reading of the pleadings. The Department's case is first presented; sometimes, persons allegedly defrauded by the respondent testify for the Department; more usually, however, the Department

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93. Only about $40,000 a year are allowed to the fraud order section for its work. In view of the immense service and saving to the public achieved by the section, it would seem that this is, indeed, a niggardly allowance.

94. An official of the Department disagrees with this suggestion on the ground that "such a practice would result in the donation of several thousand dollars annually of Government service and material to persons or concerns charged with the fraudulent use of the mails."

95. It is to be noted that the Department's practice in relation to transcripts of the record is identical to that of some federal district courts. One can scarcely find justification for the practice in the fact that judicial bodies likewise indulge it.

depends upon the testimony of experts that the respondent's representations are necessarily false or impossible of fulfillment; upon the testimony of the inspector who may have held himself out as a prospective customer[96] and who usually has interviewed other customers; and upon statements of customers allegedly defrauded. Upon completion of the Department's presentation, the respondent proceeds with his case.

All witnesses are sworn, but since the hearing officer has no power to administer oaths, a notary public who is an employee of the Department is summoned to perform this function. This is done at the opening of the hearing, when those who are expected to testify are sworn en masse.[97] If, as occasionally occurs, witnesses are called who were not originally expected to testify, the notary must again be summoned to perform the ceremony.

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96. This usually occurs in medical and similar cases, where the inspector sends in a description of his purported symptoms and receives a prescription in return which is obviously unsuited to the supposed disease. In one case the respondent represented his ability to analyze and prescribe cures as an urinologist. The inspector sent in a concoction of library paste and other ingredients and was promptly informed that he had several deadly diseases.

97. The practice of mass swearing has been justifiably condemned by lawyers and judges. "To obtain the maximum efficiency of the oath, the following features should be restored:

(1) It should be administered by the judge, not the clerk.

. . . .

(3) It should be administered anew to each witness coming to the stand, not to a group and in advance." (italics in original) American Bar Association Committee on Improvements in the Law of Evidence, 63 A.B.A. Rep. 586 (1938).

It would appear to be desirable for the Department to abandon the practice of mass swearing, and to take steps to obtain a statutory amendment which would empower the hearing officer to administer oaths.

Concerning the "rules of evidence" applied in fraud order proceedings, it is both difficult and dangerous to generalize. Although for some time the chief attorney has been considering preparation of a handbook, in fact no rules have been formulated. Descriptions of the rules include the statements that "the 'rules of evidence' as used in judicial tribunals are not strictly applied, but an effort is made to apply such rules within the scope of the hearing, as far as possible," and that the rules are "liberal" and "a matter of common sense."

It is undoubted that some hearsay is admitted;[98] for example, inspectors are permitted to testify to statement made to them in interviews and the like where such statements were made "by responsible persons in a position to be informed with respect to the facts." The standards for admission or exclusion of ex parte statements are asserted to be whether or not they are inherently incredible. If there is a "reasonable basis for believing that the statement contains a reliable basis of fact," it will be admitted. The example cited of the situation in which a statement will be excluded is that where a respondent alleged to be fraudulently engaged in vending a "gold detector", introduces a customer's statement that the latter, by means of the detector, discovered a gold mine. The statement is inherently improbable and will be excluded. On the other hand, a

98. But courts have refused to enjoin a fraud order merely because the Department admitted and relied upon what was held to be hearsay. Cf. Farley v. Simmons, 99 F. (2d) 343 (App. D.C.,1938) cert. den. 305 U.S. 651 (1938).

situation cited as one in which the statement will be admitted is where a respondent, alleged to be selling worthless oil stock, has mailed representations that on a certain date oil was struck and "splattered all over" a certain derrick; a written statement from the oil driller on duty that day, to the effect that he saw no oil at all, will be admitted. In addition written statements in the form of complaints and testimonials are sometimes admitted for "what they are worth." It is asserted that complaints, when admitted, are "not taken as proof of the allegations of fact against the respondent," but rather to show that certain representations were made, or to illustrate operations of the business (e.g., a complaint that certain products promised to be sent were never received will be admitted to show that respondent, despite a guarantee, disregarded complaints). Similarly, testimonials are admitted to show that the respondent has in fact received testimonials which he prints in his literature, but they are not accepted "as proof with respect to the business therein set forth."

Although in many situations these standards may be an application of the "common sense" rule, the "inherent incredibility" test may beg the question by assuming the very conclusion in issue - whether or not there is fraud. It is true that the receipt of several thousand complaints of the non-receipt of goods is persuasive evidence of the fact of non-receipt; but in the last analysis it is difficult in most cases to understand what real importance or even relevance ex parte complaints and testimonials have. In the case of

complaints, there is, of course, a grave danger of accepting the outcries of disappointed, but not duped, customers. In any event, the Department presents - as it must - more direct evidence (in the form of expert evidence and of testimony of inspectors who have held themselves out as customers) of fraud. Under such circumstances, a mass of unsworn complaints would seem ordinarily to be unnecessary to the Department's case and their admission is properly limited. Similarly in regard to testimonials, the mere fact that a customer is pleased means little; the pleasure may be born of ignorance or accident, and again, the Department would be wholly justified in evincing reluctance to admit them without qualification.

It is submitted, therefore, that in relation to ex parte statements - particularly testimonials and complaints - strict standards are properly applicable. It appears proper to permit a witness to testify, as he is now permitted to do, concerning statements of customers and others made to the witness in the course of interviews and the like. Under such circumstances, the witnesses are subject to examination at the hearing concerning the nature of the interview, of the persons interviewed, and the surrounding facts. Even this type of evidence should be utilized only for corroboration and when more is unavailable.

Respondents' difficulties of proof are heightened by the absence of any provision for taking depositions and the absence of any power of the Department to compel attendance or testimony of witnesses by subpoena. The fact that there is no deposition procedure,

when coupled with the practice of holding hearings in Washington and with the Department's justified reluctance to accept testimonials offered by the respondent, may impose a serious hardship upon the respondent by making potential witnesses in his behalf unavailable. Similarly, the absence of a subpoena power may hurt the respondent considerably. Witnesses, especially those of the usual type of subscribers to mail order advertisements, may be unable to travel to Washington, and, too, often may have an inherent distaste for testifying "against the Government."[99] It is argued that institution of a deposition and subpoena process would provide for the respondent a ready instrument of delay. But it is not to be expected that subpoenas will be issued and depositions permitted unless the respondent can show need. Abolition of some of the obstacles to the respondent's complete presentation of his case would seem to be desirable. It is, therefore, suggested that the Department provide for the use of depositions and take the necessary steps to acquire statutory authority to issue subpoenas.[100]

Oral arguments; briefs. Respondents are granted the privilege in all cases of arguing orally before the hearing officer at the close of the taking of testimony. If they prefer to argue orally after

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99. The Department itself has little difficulty in these respects since its own inspectors as well as experts from federal agencies and from medical associations in Washington are always available.

100. It is also urged that subpoenas and depositions would involve considerable expense to the Department. While this is a real and practical obstacle, it is submitted that efforts should be made to obtain funds for these purposes. Legislative insistence upon complete fairness to private citizens involved in litigation with the Government ought to result in receptiveness to an appeal for funds on these grounds.

a study of the record, they may do so upon a date set for that purpose. Oral argument is often transcribed and embodied in the record; in many cases, however, upon the respondent's request, such argument is omitted from the record. Permission to file briefs, a matter of discretion on the part of the hearing officer, is very rarely refused and then only where it is believed that filing would consume so much time as to defeat the enforcement of the law. There are no rules concerning their form, style, or content; two to three weeks are ordinarily allowed.[101]

Post-hearing procedure. No intermediate report or other proposed finding of facts is prepared or submitted to the respondent. Upon the close of the hearing, his only opportunity further to affect the ultimate disposition of the case is to argue orally before the Solicitor. No particular time is assigned for the exercise of this privilege: Such argument is usually taken shortly after the close of the hearing, and may be before the Solicitor knows anything about the details of the case.[102] The argument is, in form, a conference concerning the case, rather than a formal judicial presentation. The Solicitor may call in subordinates to assist in the conference; no stenographic record is kept. With this conference, respondent's participation ends and the further disposition of the case is entirely internal.

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101. But in the absence of a transcript of the record (see p. 62 above), the value of the right to file a brief may be greatly diminished.

102. See testimony of Solicitor on May 31, and June 1, 1939, in National Weeklies, Inc. v. Farley, Civil Action No. 2069, District Court, District of Columbia.

Upon the completion of the hearing, and after briefs are filed, the trial attorney consults informally with the hearing officer to "see how the case stacks up" in the hearing officer's mind. The hearing officer, it is said, indicates his decision as to whether fraud has been shown, and may outline his views of salient issues in the case. Thereafter, the trial attorney who has analyzed the inspector's report, recommended the issuance of citation, prepared the memorandum of charges, and represented the Department in the presentation of the case, prepares a draft of the findings of fact (with occasional page references and written in the first person) and the decision. This draft is submitted to the hearing officer for his approval; he reads it over, consults the record where necessary, and may make such changes in the draft as are required. Thereafter, the draft, along with the record and the exhibits, are submitted to the chief attorney of the fraud order section who previously approved of and signed the original memorandum of charges, and who also supervised the preparation and conduct of the Department's case. If he disagrees with the draft, he may discuss the matter with the trial attorney and may suggest alterations in the draft, though usually his rereading results only in comparatively minor changes. If there are any changes of substance, the draft is resubmitted to the hearing officer for his initialling. Next, the Assistant Solicitor considers the draft in connection with the record, the briefs, and other necessary documents.

Upon approval by the chief attorney of the fraud section and by the Assistant Solicitor, the decision is transmitted to the Solicitor. He may, of course, read the record, if one is made, and it is said that on occasion he does. Necessarily, however, he is

dependent upon the reports and material submitted by his subordinates; it is said that he rarely has reversed the decision and that when he has done so, it has always been to dismiss where the draft recommended otherwise. The Solicitor then signs the decision and submits it, accompanied by the record, to the Postmaster General. Again, it is impossible to ascertain the extent of that officer's consideration of the case; here it may even more safely be guessed that the consideration is ordinarily very limited.[104] In "cases of special interest", however, he may call in his subordinates to discuss the details.[105] Thereafter he signs the fraud order, to which is attached the often

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103. In the National Weeklies case (supra note 102) where there was occasion for great speed because of the nature of the fraud, the Solicitor testified that he began his study of the record at 4 P. M. one day, worked on it until 11 or 12 midnight, and finished early the next morning. At this stage of that case, the Department was well aware that the respondents were fighting the case forcefully; the respondent had, prior to this and after the close of the hearing, obtained a letter from the Postmaster General suggesting that the Solicitor consider the case.

It is to be recalled that many of the cases have long records, sometimes exceeding 1,000 pages, with many exhibits and much technical evidence, and further, that the Solicitor has a multitude of other duties naturally attendant upon the immense business conducted by the Department (questions of construction and other contracts, unmailable matters, disputed ownership of mail, tort claims and similar problems). See P.L. & R. 10 for a recital of the Solicitor's duties.

104. Examination of sample cases discloses that usually the Postmaster General approves the decision on the same day, or the day after, it is submitted to him.

105. See the testimony of the Solicitor in the National Weeklies case (supra note 102) to the effect that he discussed the decision with the Postmaster General for 40 minutes, and referred to 30 or 40 pages. And see the testimony in the same case of H. J. Donnelly, former Solicitor for the Department (pp. 126 - 128):

> Q. ". . . do you state . . . that in your experience as Solicitor . . . the Postmaster General never considered the evidence in a fraud case . . .?"
>
> A. ". . . To be perfectly frank with you, I cannot recall many cases where the Postmaster General ever read the record in a fraud case." (Continued)

lengthy and complete summary of evidence, findings of fact, and decision as signed by the Solicitor. If fraud is found, the post-master at the office of the respondent is notified that he must return all mail addressed to the respondent after he has stamped "fraudulent" upon it.[106]

Conclusions concerning the post-hearing procedure. Evaluation of the post-hearing procedure utilized in domestic fraud order cases focuses on the points: (1) The absence of an intermediate report or

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105. (Continued)

Q. ". . . [had] you ever discussed with the Postmaster General the evidence that was adduced at a hearing . . .?"

A. "On very, very rare occasions. . . It is a routine matter with the Solicitor's office."

But fraud orders have consistently survived attacks grounded in the failure of the Postmaster General fully to participate, although the statute prescribes that the evidence must be "satisfactory to him". E.g.:

> "Everyone knows that the Postmaster General in person cannot attend to the innumerable duties of the Department. It is enough to know that he acted . . . and the legality in no manner depends upon the fact that he was assisted by others in the department." People's Bank of U.S. v. Gilson, 140 Fed. 1 (E.D. Mo., 1905).

See also Lewis Publishing Co. v. Wyman, 152 Fed. 791 (E.D. Mo., 1907); Crane v. Nichols, 1 F. (2d) 33 (S.D. Tex., 1924). Renewed attacks following the Morgan case have similarly been rejected in the cases cited supra note 90.

106. The time consumed by the post-hearing procedure varies from less than a week to several months. The fraud order has an indefinite life. How long it may remain in effect has never been judicially determined. The Postmaster General may, and occasionally does, revoke the fraud order upon the receipt of a stipulation of discontinuance. In addition "supplemental orders" may be issued where it appears that a respondent against whom an order has been issued has resumed the business under a different name. Evidence is secured by complaints, test correspondence and investigation. The order issues without notice or hearing, since the only question is identity and such order follows immediately upon the heels of a prior fraud order hearing.

other proposed findings; and (2) the method of preparing the ultimate decision. In respect of the first, the Department's officials believe that an intermediate report would succeed only in producing interminable delay and wrangling. It must be remembered, runs the argument, that fraud orders deal with a special situation where the scheme often involved is a get-rich-quick one, where a government owned means of communication is being employed as an integral part of the nefarious plan and the government is being used as an agent for its consummation, and where the public must be protected with all possible expedition. To issue an intermediate report it is argued, would be a device which might be gleefully seized upon by respondents to hang on just a little longer, and would defeat the Department's purpose to end these frauds before they achieve any measure of success. Absent a power to obtain some sort of injunction pendente lite, this argument has considerable force, although the three or four weeks added by an intermediate report may be a short period as compared to the year or more now sometimes consumed between investigation and ultimate order.[107] Further, it is argued that an intermediate report is unnecessary: The purposes of such a report - to focus the issues,

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107. A respondent recently invoked the Morgan case doctrine in an effort to vitiate a fraud order on the ground of the absence of an intermediate report. In rejecting this contention, the court said, "I know of no provision of law that entitles this plaintiff [the respondent] to that [service of finding of fact prior to the issuance of the order], and I think we must necessarily look at this case in the light of the situation as it then existed. This [lottery] contest was about to expire; a continuance to any great length of time, at least, figuring days only, would mean that the very purpose of the Postmaster General would be thwarted by that delay." Letts, J., National Weeklies v. Farley, (D. D. C., 1939) (unreported).

to serve as some sort of prognosis of the Department's ultimate decision, and to present an opportunity for the respondent to clarify his position on the basis of the hearing - are already achieved. The respondent, it is said, knows precisely what the issues are; the case is clear cut, and the intermediate report would thus be a wholly useless document. While, again, there is some force in this argument, the clarity of the case, especially those involving technical evidence and subtle schemes, may be exaggerated, and the practice of the Federal Trade Commission, where proposed findings are uniformly utilized, even though the Commission deals with similar subject matter, is to be noted. But more important, an intermediate report, together with the exceptions and an oral argument thereon, is a valuable device for drawing together the vital issues presenting a complete and concise picture of the case, and permitting the deciding official to make an intelligent selection of the opposing contentions.

The situation obtaining under the present practice of the Department is to be distinguished from that in ordinary criminal cases before a jury. In the latter situation, it is true that the defendant is limited, after the presentation of the evidence, only to oral argument, but there the argument is addressed to the very persons who heard all the evidence and who make the determination. In the fraud order cases, the respondent's oral argument, on the other hand, is made either to the hearing officer, who does not finally make the findings, or the Solicitor who has not heard the evidence, and has not yet become familiar with the record. Thus, in effect, if the respondent in a fraud order case chooses to argue before the hearing officer, he is not addressing

his argument to the crucial person who decides; if he chooses to argue before the Solicitor, he cannot argue against or upon any defined findings or opposing position, since none has been presented to the Solicitor. One cannot avoid the conclusion, thus, that the respondent's proceedings before the Solicitor are conversations more or less in vacuo in the absence of an opportunity by the Solicitor first to learn what the issues and evidence are, while on the other hand, the fraud order section subsequently has opportunity to present its views and pass upon the drafts of the decision. While probably the dangers are more theoretical than real, this method of presentation may not be one which provides a real opportunity for the parties to raise the issues, and to present the opposing contentions from which the appellate officer may make an informed choice.

It is at this point that the problems of the intermediate report coalesce with the problems of the preparation and consideration of the ultimate decision. Given somewhat more insulated consideration of the evidence produced at the hearing, one would miss the intermediate report less. One cannot help recalling that in fact the duty of preparing findings of fact falls at least in the first instance upon the Department's trial attorney, subject only to subsequent check by his superiors and the hearing officer. Indeed, as described above, he may first talk over the case with the hearing officer, but the latter at this point does not fully articulate his decision and direct the preparation of specified findings. And once the trial attorney reduces the findings and decision to writing, mere inertia, if nothing else, may operate toward their acceptance. Only the trial attorney

regularly reads the record, although others may "dip into it." The hearing officer, the chief attorney, the Assistant Solicitor, the Solicitor and the Postmaster General must all approve the decision, but, again, it is doubtful that (except in unusual cases) they will read the entire record or bring a new approach to the resolution of the issues. The question thus remains: Is the trial attorney a proper person to bear the major burden of preparing the decision?[108] That there are dangers in the present post-hearing role of the trial attorney is clear. Whatever the attempt at objectivity during the trial on the part of the Department attorney whose primary duty is admitted to be that of an advocate in support of the charges, the fact remains that it is he who examined the prehearing

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108. One school of thought insists that a trial attorney must necessarily by virtue of his participation in the hearing as an advocate, be unable thereafter objectively to view the case. On the other hand, it may be argued that simply because an attorney has represented one side, he is not incapable of its proper appraisal. Again the argument of expedition and economy of energy is made: After all, the trial attorney is the person most familiar with the case, and there are sufficient checks against any aberrations which might arise from his predisposition, if he has one. In this type of case, therefore, it is sensible for the most informed employee to prepare the decision. In addition, it is said, the "prosecutor" aspect of the trial attorney is over-emphasized. Department officials assert that "the object of the hearing is to ascertain the facts . . . and not merely to 'prosecute' the respondent. It is the duty of the trial attorney to see that the record contains all the relevant evidence, whether such evidence favors his position as Government counsel attempting to sustain the charges of fraud or not." Under these circumstances, it is argued that the danger of abuse occasioned by the trial attorney's participation in the posthearing phases of the case is diminished.

material[109] and determined that citation should issue. In addition, one cannot escape the impression that whatever the Departmental intent, there is considerable truth in the comment of one of the trial attorneys during a trial that "You'd be surprised at the difference in approach between the man down here [the trial attorney] and the man up there [the hearing officer]."[110] In the absence of an intermediate report or an independent review of the record, it seems that the Department's present practice is not ideally suited to a complete protection of the respondent's rights.

No very sweeping Departmental reorganization appears necessary to correct the present defects. The single goal is simply to afford the respondent some further opportunity to meet the Department's proposals, to participate in the ultimate selection of findings, and to obtain a more independent consideration of the case. To achieve these objectives, the starting point is clearly to lessen the present role of the trial attorney in the post-hearing procedure, and to emphasize that of the hearing officer. The advantage of the latter's

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109. This material is retained in the files which accompany the record. It is insisted, however, that only the evidence adduced at the hearing is considered. But unconsciously some of the material may affect the determination of the case if it is read, and it is suggested that the prehearing matter be isolated in a separate file and be withheld from those who consider the case after the hearing.

110. Attorneys for respondents insist that the fraud order section is primarily "prosecutor". Exposure to varied types of defrauders does seem to have developed, somewhat understandably, a certain predisposition against respondents, who are generally regarded as knaves. One attorney in the fraud order section expressed dissatisfaction with the requirements that respondents obviously guilty had to be "treated like old ladies from Back Bay." And compare the statement (supra note 68) by an attorney who passes upon citations and also upon the final decision that "One way to get your face red in this business is to issue an unwarranged citation."

judgment is not now fully utilized. Although he is present throughout the hearing, acting as a "judicial" officer, and in the best position to select and determine, he now plays a somewhat inactive part in the disposition of the case after having served as moderator at the trial.

It may be suggested, therefore, that the present post-hearing functions of the trial attorney should be transferred to the hearing officer, so that the latter could prepare the decision without the intervention as "adjudicators" of the trial attorney and the chief attorney of the fraud order section. Some reordering of the mechanics would be necessitated by such a transfer. The task of studying the case and formulating the decision would increase the hearing officer's burdens, and it is possible that his time is now insufficient to assume such burdens. But, particularly in view of his added responsibility in the cases, it would seem suitable to relieve him of all other duties, and, as discussed above, to dispense with hearings when the respondent neither answers nor appears. Only ninety cases annually now proceed to hearing, many of these are simple and short, while others need not, as suggested, go to hearing at all. If experience should demonstrate that the burden is too heavy, a second hearing officer may be added to the staff: If the trial attorneys are relieved of the duty of preparing findings, it is probable that one such attorney could be freed for transfer permanently to the hearing officer's staff.

Even if the task of determination is shifted to the hearing officer, problems of the method of the post-hearing procedure will remain. First is the question concerning the precise effect of the

hearing officer's determination; second is the problem of the most suitable method whereby the parties can present their arguments to the Department after the hearing. In respect of the first question, it is submitted that the hearing officer's determination should be regarded as more than a mere recommendation. His intimate contact with the particular case, and his knowledge of the general subject-matter, derived from his long, and as is proposed exclusive, concern with such cases warrant heavy reliance upon his decision. Particularly is this so in the light of the fact that the roles of the Solicitor and the Postmaster General must, because of the press of their other duties, be incidental. Under these circumstances, it seems proper to give to the hearing officer's determination the same weight as would be given to a jury's verdict; conclusive as to his findings of fact if they are at all reasonable. Intra-agency appeal to the Solicitor as the chief law officer (permitted both to the Department's trial attorney and to the respondent) should be preserved; the appeal, however, should be limited to questions of law.

If these suggestions are accepted, the problems of focussing the issues, of a proper opportunity for the respondent to present his views, and the like, occasioned by the absence of an intermediate report, largely disappear, since the basic determination is made by the very person who presided at the hearing and to whom all evidence and arguments were presented in the first instance. Just what should be the machinery leading to his determination may be left to the discretion of the hearing officer. In simple and obvious cases, he can announce his decision from the bench at the close of the hearing

and direct the attorney of the successful party to prepare findings in accordance with the decision. In closer cases, where he feels it may be useful, he may request both parties to submit proposed findings; he would then make his selection and prepare his written decision. Or, finally, if he does not believe that proposed findings would be useful, he could proceed to the preparation of his decision forthwith. Upon the basis of such decision, the limited appeal as suggested above could be taken. It is submitted that this proposed method, envisaging major responsibility of determination by the one person who heard the cases and acted in a "judicial" capacity, preserves the elements of speed, adds to the respondent's rights to obtain an independent judgment, and is more valuable to him than the present "right" of somewhat haphazard reviews and appeals.[111]

Foreign fraud order procedure. Departing from the procedure related to issuance of domestic fraud orders is that utilized in cases

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111. It is not clear that these suggestions may be immediately adopted under the present statute. As discussed above, the statute requires only that the Postmaster General issue a fraud order "upon evidence satisfactory to him." It might be argued that a finding by the hearing officer and affirmance by the Solicitor would constitute "evidence" which would be "satisfactory to him." It is to be noted that the form of the present decisions would lend support to this: The findings, written in the first person, are signed by the Solicitor, while a separate page containing the order is appended and signed by the Postmaster General. It seems unquestionable that many fraud orders are issued without examination of the record or discussion of the facts by the Postmaster General. But the statutes may be construed to mean that the "satisfactory evidence" refers to the evidence adduced at the hearing. If that is the case, an amendment permitting the hearing officer (who may be designated as the Adjudication Officer) to make findings would be necessary. See the proposal of the Joint Congressional Committee for Commission of Postal Appeals, supra note 86. In any event, an amendment to the Department's regulations delegating such power to the hearing officer seems to be required.

involving respondents whose businesses are located in foreign countries.[112] Against such respondents the Postmaster General may also issue orders to all postmasters engaged in dispatching foreign mail (i.e., mail addressed to foreign countries), forbidding the forwarding of such mail and requiring its return to the sender marked "fraudulent." Because "the Department has no jurisdiction over and it is impracticable to serve memoranda of charges" upon such respondents, these orders are issued without notice or hearing. Sometimes, there is investigation; on occasion, however, upon the receipt of "enough specific" complaints from alleged victims, the order issues forthwith. The respondent normally knows nothing about the proceedings until suddenly he finds that no mail is arriving from the United States.[113] Even after he discovers that a fraud order has been issued against him, he or his representative, is permitted only to see the findings of fact, which are usually brief and unhelpful; he cannot see the files

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112. The domestic procedure is applied to Canadian respondents who have agents in the United States.

113. An extreme case indicates how severe a penalty this is: The respondent, a stamp-dealer whose business the Department conceded was in "large part legitimate," had shipped many stamps to the United States for which customers owed him money. In addition, he had attempted to insert a classified advertisement in a nationally known magazine, and had sent the money therefor. The magazine did not accept classified advertisements. It, and the obligated customers, attempted to pay what they owed, but the respondent could not receive the money, since the fraud order had been issued and their letters were returned to them.

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or learn of the specific evidence against him.

It is difficult to account for this cavalier treatment of non-resident respondents, particularly in view of the Department's insistence upon holding hearings in domestic fraud order cases even where the respondent does not appear and answer. It would surely seem that here, where the order is issued upon a scattering of complaints which at least possibly might be "rigged" by domestic competitors or might simply be the funings of unintelligent consumers ready to suspect foreigners, there would be advantages in requiring direct testimony by the complainants. Nor does it seem entirely impossible or impracticable to serve the foreign respondent: radio stations could probably transmit the charges at reasonable cost, the consular offices could be utilized to serve such charges, and the air-mail service is sufficiently speedy to permit prompt notice. While a hearing which would include opportunity for the personal appearance of the respondent is probably not feasible, at least he would be notified of the charges, could submit affidavits and would be able to secure a representative to protect him at the hearings. In any event, whether or not a full hearing procedure is installed, this would seem a proper situation for the Department to demand more, not less, investigation which would include test correspondence to a greater extent than now practiced, and careful and searching interviews of the complainants.

It is to be noted, however, that in one class of cases, the present procedure is sufficient. This is the class involving obscenity advertisements, where the Department has caught the respondent on the horns of a dilemma. If the respondent advertises obscene products, and in fact his products are obscene, according to the Department's theory, his offer to deliver such products is fraudulent since obscenity cannot pass through the customs.[114] If, on the other hand, the material is not in fact obscene, the respondent's representations are in any event fraudulent.[115] It is therefore apparent that the mere advertisement of the respondent is enough in this type of cases, and that notice and hearing are unnecessary. The interpretation of the advertisement - whether or not it represents that obscene matter will be sent - may remain as an arguable issue upon which the respondent should be heard, but here, as in questions involved in the second-class

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114. But obscenity is often a matter of personal judgment and what the Post Office Department judges obscene may be different from what the Treasury regards as obscene. There is no consultation between the Departments in such matters. In addition, the Treasury statutes permit the Secretary to admit the classics or books of recognized and established literary or scientific merit, even if obscene. Therefore, in fact, the obscenity may come through the customs. This, however, is a theoretical danger: The material involved in these proceedings presents no question as to its nature.

115. " . . . the salacious minded . . . as well as the innocent, are entitled to the protection of the laws against fraud": Farley v. Simmons, 99 F. (2d) 343, 348 (App. D.C., 1938), cert. den. 305 U.S. 651 (1938), rehearing denied, 305 U.S. 767 (1939).

mailing privilege (see p. 24 supra), the thing under consideration is complete, speaks for itself, and in this type of case, speaks quite plainly. The interpretation would be largely a personal one in any event, and argument thereon would probably not be fruitful.

The fraud order and related statutes administered by other agencies. One cannot leave the subject of the fraud order power of the Department without observing that in some respects, it is one concurrent with the jurisdiction of another federal administration agency. The relation of the fraud statutes administered by the Department to the statutes administered by the Federal Trade Commission gives rise to the query whether, in the interest of unified and economical action, the fraud powers - including the power to return all mail marked "fraudulent" - should not rest in the hands of one agency. The Federal Trade Commission, of course, strikes down only the fraudulent representations and other deceptive features of an enterprise. Its cease and desist orders are directed only toward correction. As already noted, however, the Post Office Department, although dealing with the same question of fraud, at least has the power to destroy the entire business, in so far as it is dependent on the receipt of any mail, whether or not connected with the fraud.

Yet as to all respondents in interstate commerce who use the mails, the jurisdiction of the two agencies, as well

as the subject matter with which they deal, is identical. Even more striking is their identity of power since the recent addition to the Federal Trade Commission Act of Section 12 (a), which makes it unlawful to disseminate, or cause to be disseminated, any false advertisement.

> "(1) By United States mails . . . for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, or cosmetics; or
> (2) By any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices or cosmetics." (underscoring supplied)

The phenomenon of two agencies exercising concurrent jurisdiction over an identical subject matter may be justified on the ground that, while the Trade Commission's interest is centered solely upon the evil sought to be remedied, the Post Office Department is concerned not only in the elimination of the evil, but also in protecting itself from providing the means, through its own services, to accomplish the bilking of the public. Thus it may be argued that the Post Office Department is engaged in a business; it, therefore, is the proper agency to determine with whom to do business and under what circumstances. While there is a certain surface plausibility in this contention, it scarcely goes deeper. Aside from the fact that it is uneconomical to have two groups engaged in part in precisely the same activities, there are several objections to the existing organization. It is at least possible that a person may be called to account

simultaneously by the Federal Trade Commission, the Post Office Department, and even the Food and Drug Administration - all for the same set of facts. In one situation this did occur; immediately after proceedings by the Federal Trade Commission and the issuance of a consent order by it, the Post Office Department issued a citation without any claim that the F.T.C. order was being violated.[116] However knavish the respondent, one cannot avoid sympathizing with his feeling of persecution where he is subjected to a series of onslaughts by the several agencies for the same set of facts.

Doubtless the time is not ripe for a merger of the fraud functions and the vesting of the power of returning mail addressed to the respondent in the Federal Trade Commission, particularly in view of the fact that the fraud cases handled by the Department demand the utmost in expedition, while the Commission's cases often drag over a very long time. But some sort of integration, whether by statute or by voluntary action, would be desirable. Especially is this so in view of the contrasting sanctions of the two agencies: As described above, even where the respondent's business may be in large part legitimate, but some of its representations are fraudulent, the

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116. In this case, the respondent pleaded the issuance of the F.T.C. order based on the same facts upon which the Post Office Department had issued its citation. Not without force, the respondent argued that, in view of its compliance with the consent order, the Department should not proceed to put it out of business. Recognizing the justice of this position, the Department dismissed its citation to show cause. See respondent's brief, Matter of E. R. Page Company (Post Office Department, 1938)

Department's fraud order can do nothing less than cut off all mail from the respondent. This type of case seems to be peculiarly susceptible to the Federal Trade Commission's processes rather than to the Department's. On the other hand, it is probable that in some cases arising under Section 12 (a) of the Federal Trade Commission Act, the respondent's business is inherently fraudulent and the use of the mails is an integral part of its business. Such cases seem to be of the type susceptible to postal fraud orders.[117] As a matter of economy of effort, and to prevent harassment of respondents, steps toward coordination of policy between the agencies seem desirable. A general program may well be devised assigning inherently fraudulent schemes where the use of the mails is an important factor to the Post Office Department, and cases involving fraudulent execution of certain phases of the business to the Federal Trade Commission.[118] Conferences on particular cases could be held, and care should be taken to prevent a repetition of the E. R. Page case.

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117. It is said that in a number of cases in which the Department has instituted fraud proceedings against respondents against whom the Commission had issued cease and desist orders, investigation had disclosed "beyond question that such orders were abortive in so far as protecting the public is concerned", and that the basically fraudulent scheme still persisted.

Of course, there seems to be no legal obstacle to empowering the F.T.C. to issue a fraud order cutting off the respondent's receipt of mail, unless an extraordinarily departmentalized view of the federal government be taken to vest in the Postmaster General exclusive jurisdiction over the use of the mails.

118. It is asserted that the Department through the Chief Inspector has made repeated efforts toward some sort of integration by voluntary action, but "little success has been achieved in securing the cooperation of the Commission to this end and it is obviously its intent and purpose if so permitted to assume the duties of the Postmaster General."

C. ADVISORY AND ADVANCE OPINIONS

Eight volumes of advisory opinions have been issued by the Solicitor's Office. These opinions, interpreting the postal statutes and relating to their enforcement and administration, are issued in response to inquiries submitted by local postmasters and by other officials of the Department. In addition the Solicitor's office sometimes gives opinions to private persons who submit (normally through the local postmasters) questions respecting the use of the mails where violations of the statutes may be involved. In all cases, whether involving fraud or unmailability, the Solicitor will issue such opinions "where the enterprise is so completely described" that it is "recognizable as one that will in fact violate the law." In the great majority of cases involving fraud, however, it is the Department's practice to issue a "no opinion" letter which simply sets out relevant portions of the statute. In cases involving lottery and unmailability questions, on the other hand, a major device for enforcing these statutes is through the medium of advance opinions. It is not at all uncommon for publishers and others to submit proposed advertisements or other written materials in order to discover whether they are mailable, or whether they fall within the proscription against lotteries or other games depending on chance. In such cases, rulings are furnished in advance, and, if the ruling is adverse, it may safely be presumed that the inquirer will not mail the matter.

The Department's officials do not consider that such advance opinions are in the nature of final judgments except "where parties are plainly informed that the matter under consideration cannot be transmitted through the mails, or that the scheme is obviously in violation of law". Nor are they considered binding upon the Department "in the event that action becomes necessary under the postal laws and regulations." Thus, even if the advance opinion is favorable and there is no claim that the operation of the enterprise was different from that originally described, subsequent action is not precluded. For example, in a case arising a few years ago, the sponsors of a proposed contest submitted full details of their plans, their operations, and their advertisement, to the Solicitor, who ruled that the contest did not offend the lottery statute. Although it was not claimed that the entrepreneurs deviated in any way from the plans proposed, or that the contest was other than as described, the Department issued a letter of citation and ultimately a fraud order against the persons conducting the contest.

The refusal to issue advance opinions where fraud statutes are involved is justifiable; in such cases the many forms which the schemes take, the impossibility of obtaining all the detail which often mean the difference between fraud and a legitimate business, and the likelihood that subsequent events will alter the facts of the question as posed, all combine to

render advance opinions dangerous. To a somewhat lesser degree the same factors are present in lottery questions; but here it is far more possible to present the whole picture in advance. And none of these factors is present where the issue is one of obscenity or similar unmailability, where the ruling clearly relates only to facts which are certain and fixed, since only the proposed literature is in question. Nor, as indicated by the frequent submission by publishers of contest and similar advertisements, is the need for rulings inconsiderable; the publisher of a periodical is scarcely willing to risk the seizure of an entire issue, or even perhaps the criminal penalties which may be imposed for attempting to mail proscribed matter.

In lottery cases, administrative declaratory judgments may perhaps be unsuitable. Nevertheless, it is submitted that a statutory provision would be desirable to protect an inquirer who relies upon a favorable ruling and against whom there is no claim of departure from the scheme as first presented to the Department, from a Departmental change of mind, at least until sufficient time is given before the ruling is amended. But where there can be no question of dynamics - for example, where the matter in question is the proposed literature - the situation seems a proper one for a declaratory judgment, binding upon both parties, and, if adverse, subject to test by injunction. The publisher should not be forced to prepare all the copies of his entire periodical, present them for mailing, and then be subject either to the risk of exclusion

or of criminal proceedings. In effect, as observed above, this risk is so great that he will withdraw the offending material upon which an adverse advance opinion has been issued. No reason appears why the further step of considering the ruling, whether adverse or favorable, as final and binding, and subject to attack, if adverse, in the courts,[119] should not be taken.

II.

Issuance of rules and regulations. Pursuant to specific statutory power vested in the Postmaster General, a large body of rules and regulations have been issued by the Post Office Department. The great mass of these regulations deals with the manner in which postal employees shall conduct the large business of the Department, both in relation to other parts of the postal service and in relation to the public. Many of these "internal" or "lunch hour" regulations do, of course, more largely affect persons not within the Department than do comparable regulations of other agencies. In addition, there are many other regulations - those relating to rates, to classification, or to pre-cancelled stamps, for example - which are more nearly analogous to the usual type of regulation, although in a sense, these too mainly concern the management of the postal enterprises.

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119. In fact, it is very possible that the Department's advance opinion, if adverse, can now be subject to attack by injunction. The Department, through its ruling, has indicated its intention of excluding the matter. This may be sufficient to spell out the immediacy of irreparable injury to the publisher.

Periodically (in 1913, in 1924, in 1932, and at the present) a committee comprised of officers of the various divisions of the Department is set up to revise and amend existing regulations. For no apparent reason, the task of coordinating the revision by this committee is now vested in the hands of the Chief Inspector. In addition, individual regulations are promulgated from time to time, either upon application by outsiders or by divisions of the Department. Such regulations are considered by the chiefs whose divisions are affected[120] and by the Solicitor's office. When regulations of great importance - such as a change in rates - are involved, promulgation will usually be preceded by conferences between the Postmaster General, the Solicitor, the Assistant Postmaster General affected, his deputy and superintendents, and the Chief Inspector.

The Department does not hold a formal hearing prior to the issuance of its regulations; and it is probably justified in its view that none is necessary. On occasion, issuance of regulations may be preceded by special investigations by inspectors. In addition, although there is no formalized practice or procedure, outside groups may be consulted by means of informal conferences. The representative of one of the largest of these groups dealing with postal matters complains that outsiders have an opportunity

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120. It is customary for each bureau head (First, Second, Third, and Fourth Postmaster General) to hold staff meetings weekly with his division superintendents. At such meetings, regulations are likely to be considered.

to present their views only when by diligent detective work around the Department they "get wind of" a proposed regulation or when the Department feels that "there is likely to be heat" about the regulation. According to this representative several regulations - notably those dealing with pre-cancelled stamps, about which there was such a protest that modification was eventually achieved, - have been issued before groups affected knew anything about them.

To give notice of all proposed postal regulations and amendments would, of course, be scarcely sensible; even the critics of the present failure to utilize consultative methods concede that a great many of the regulations are of such minor importance that they would not want to be bothered with notice. Although it might be difficult in all cases to draw a line between proposals which may be of interest to outside groups and those which are not, it nevertheless seems desirable that the Department should make a more definite effort to canvass the views of those who might be affected. No very complicated process would be necessary, since business and other groups using the mails are apparently well organized in Washington. All of these at one time or another are affected by postal regulations and consult with the Department. It would seem possible for the Department to list these organizations, and group them according to the general subject-matter in which they would be interested. Notification of a proposed

change, together with an invitation to submit comments, would seem to be a simple procedure, and considerably more orderly than that now in effect.[121]

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121. Regulations are ordinarily effective as of the date of their promulgation. Those "directly affecting" outsiders are published in the Federal Register. In addition, the statutes, together with regulations and comments, are gathered in a thousand page volume of "Postal Laws and Regulations", whose last edition was issued in 1932, and a new edition of which is currently being prepared. Supplementing this is a Postal Guide, issued biennially, containing monthly additions, and in part devoted to regulations. Finally, regulations appear in the Postal Bulletin, issued daily. Complaint is made by outsiders that the Postal Laws and Regulations become outmoded in short order and that a huge clerical job is entailed in attempting to keep it up to date (all Postal Guide references are to the 1932 edition of P. L. & R.). In view of the immense business of the Department and the multitudinous details necessarily involved, it is difficult to comprehend how this complaint can be remedied, except temporarily by a new edition of P. L. & R., or possibly, as is done by the Federal Communications Commission, by separating the regulations into single pamphlets divided according to the general subject-matter. If this were done, changes in some sections would require only a single new pamphlet, and not an entire new 1,000 page volume.

Appendix "A"

Determination of obscenity, excerpts from comments by the Department on the feasibility of reference to panels.[122]

"Some years ago when the old 'Smart Set' was being published by Mencken and Nathan and much in vogue with the intelligensia of that day, a number contained the epigram 'To a chemist there is no such thing as dirt.' We must likewise ponder whether to an artist or connoisseur of the arts there is any such thing as obscenity. If there be no such thing as obscenity to an artist, or if the recognition of obscenity, as conceived by Society, is largely precluded by his education, culture, or 'knowledge of the liberty of expression tacitly granted to men of letters since the beginnings of English literature,' we must conclude that he is disqualified to act as a judge upon matters requiring the application of the concept of 'obscenity' entertained by Congress and the Courts. There has been no intimation from Congress that the concept of the Courts does not agree with its own.

"Panels as a method of handling questions of obscenity is discussed to some extent in the attached copy of a letter

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122. See supra, pp. 31-33.

addressed to . . . a publisher . . . [123].

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123. The letter referred to dated May 18, 1939 is as follows:
"My dear Sir:

I have read with much interest your letter of the 24th ultimo, addressed to Third Assistant Postmaster General Black, touching upon your problem of keeping your publication free from questionable advertisements, and making certain suggestions as to a possible system of passing upon publications to eliminate obscene matter from the mails.

Your public-spirited interest in this subject is a source of gratification to this office. However, I am constrained to advise you frankly that I doubt the practicability of your suggestion for the appointment of a competent, broad-minded committee consisting of ministers of religion, doctors, artists, photographers, psychiatrists, lawyers, and public officials to pass upon the mailability of alleged obscene matter.

This office makes thousands of rulings each year upon the mailability of alleged obscene matter, no two cases being alike. Many of these rulings are made by means of telegrams and affect thousands of copies of publications withheld by postmasters from dispatch pending the ruling of this office. You can readily see the embarrassment to which publishers would be subjected if such matter had to be submitted to a committee such as that suggested by you. I feel sure there would be a wide variance in the views of the individuals composing such a committee, and they would have to be constantly assembled to meet the needs of the service. A difficult phase encountered by this Department in its endeavors to administer the statute prohibiting the acceptance of obscene matter in the mails is the entertainment of such diverse views by the categories of individuals suggested by you as the personnel for a committee, all of whom appear to be honestly convinced that the Department is either too lax in permitting certain types of matter to be transmitted through the mails or not sufficiently liberal in its views in rejecting some matter as unmailable. The extremes of views of the several cross-sections of public opinion as represented by your proposed committee, are so irreconcilable that we could have no hope of such a committee functioning smoothly and carrying out the will of Congress. For example, considering for the moment only two of the classes of committee members suggested by you, while it might be possible to select a "minister of religion" and an "artist" who would see eye to eye with each other upon matter placed before them for review either the one or the other would unquestionably fail to represent the viewpoint of the overwhelming majority of his professional colleagues. The subject matter does not, of course, permit of decisions upon a compromise basis. A definite determination must be made in each instance that the matter is either mailable or is unmailable. Any delays would create great hardship in many

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"An examination of the Readers Digest for the last several months will disclose an article by Sherwood Anderson in which he frankly discusses the practice of the writing fraternity in expressing laudatory views upon the literary products of their contemporaries regardless of the actual opinion entertained as to their merits.

"We cannot close our eyes to this disposition upon the part of writers nor to the fact, with possibly few exceptions, they believe in the fullest liberty of expression. Even the critics, many of whom harbor the hope of being 'authors' tomorrow, will apply the saying of Voltaire to this subject, and indeed, would amplify it to read, 'I disagree with what you say but will defend with my life your right to say it (and to utilize the United States mail to disseminate it, albeit I have not read any law or judicial decision upon the subject)'.

123(continued) instances. A legal obstacle to your plan should be mentioned. Under the Federal Constitution Congress makes the laws and the President (with the assistance of the various Departments of the executive branch of the Government) is charged with their execution. The courts would no doubt hold that reposing the powers suggested by you in a committee seriously affecting property rights of citizens would constitute an unauthorized delegation of power. This Department is clothed with the authority to make such rulings by 18 U.S. Code 334, copy enclosed. Rulings are based upon an interpretation of this and related statutes by the federal courts. It is doubtful whether such committee as that suggested by you would be governed by decisions of the very courts in which adverse rulings would have to be defended.

Very truly yours,
(signed) W. E. Kelly
Acting Solicitor."

"It is our view that the tentative suggestion of the use of panels of the especially qualified should not be made without disposing of the question of whether that is possible under existing law or would require legislation. Officers of the Federal Government take an oath to 'well and faithfully discharge the duties of the office' undertaken. In the last analysis, under existing law, reference of questions to a panel permits the substitution of the judgment of the members of the panel for that of the officer charged with the duty of administering the law. The result could very well be nullification of the law through administration . . ."

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To this statement of the Department's views may be added this further possible argument against the use of panels: The Department is under constant pressure from persons who believe that the obscenity statutes should be enforced even more rigorously than they are; if the Department, acting in reliance upon a panel's advice, held that a publication was not obscene and then, at a later date, some court in a local criminal prosecution held otherwise, the Department might be greatly embarrassed.